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NOTES OF RECENT CASES.

Yahya Ali, J. Kumar *v.* Choyi.

1st December, 1948. C.R.P. No. 1711 of 1947.

Madras Tenants and Ryots Protection Act (XVII of 1946)—*Sub-lessees under a lessee whose term of lease has expired and who does not claim a stay—If 'tenant' entitled to ask or stay of suit for eviction against main lessee.*

X who held a lease for three years, did not ask for stay of a suit for eviction on the expiry of the term of lease. His sub-lessees whose lease was for a period of twelve years, far in excess of the period of the main lease, sought to have the suit against the main lessee stayed.

Held : The sub-lessees were not "tenants" within the meaning of that word as defined in the Malabar Tenancy Act. Though a claim for eviction is involved in the case that claim is for the eviction of the main lessee who had no objection to the eviction and did not require the suit to be stayed. The sub-lessees are not entitled to make a deposit under section 4 (6) of the Act XVII of 1946. The sub-lessees have no subsisting interest with regard to the land (the main lease having expired) and their interests cannot be said to be likely to be affected by the eviction of the tenant or sale of the land for purpose of section 4 (6) of the Act XVII of 1946.

M. K. Nambiar and M. Sekhara Menon for Petitioner.

S. R. Subramania Aiyar for Respondent.

K.S. *Petition dismissed.*

Mack, J. Ayyathurai Mudaliar *v.* Ibramsa Rowther.

2nd December, 1948. C.R.P. No. 287 of 1947.

Limitation Act (IX of 1908), *Articles* 74 *and* 75—*Applicability—Instalment bond—Default in payment of one instalment—Creditor if bound to sue at once for the whole amount—Limitation.*

Article 75 of the Limitation Act is no bar to a suit on the instalment bond itself either after or before the expiry of the instalment period for the recovery of the instalments which the debtor has contracted to pay and which have not become themselves time barred under Article 74. The two remedies are co-existent and open to the creditor and he has his choice either to wait and sue for the instalments in default under Article 74 or to enforce the default clause in a suit contemplated by Article 75. A suit filed under Article 75 may be dismissed on the debtor proving waiver by the creditor of the default which entitles the creditor to file such a suit, in which case the creditor can of course still fall back on his right to sue for instalments within the time limits perscribed by Article 74. He also has the other alternative of suing to enforce the default clause for a subsequent default which he has not waived within the period prescribed by Article 75. It cannot be said that,

because the whole amount became payable on default, the creditor must sue on the whole bond within three years of such default. Article 75 clearly and specifically lays down the right of the payee or obligee to waive the benefit of the default clause.

The payee has the option of enforcing the default clause in Article 75, and if he does not do so, he must be deemed to have waived the benefit of the provision and he then can fall back on his ordinary right of suit on the covenant to pay by instalments under Article 74.

I.L.R. 57 All. 108 (F.B.) dissenting view of Mukherjee J., followed.

68 M.L.J. 244 and I.L.R. 1943 Nag. 630, relied on.

T. S. Vaidyanatha Aiyar for Petitioner.

N. S. Srinivasan for Respondent.

K.S. ——— *Petition allowed.*

Subba Rao, J. Palaniyandi Mudaliar *v.* Palanivelu Mudali.

3*rd December*, 1948. A.A.A.O. No. 246 of 1946.

Provincial Insolvency Act (V of 1920), *section* 78—*Period between date of adjudication and date of its annulment—When excluded in computing limitation for recovery of a debt due by the debtor—Vesting of insolvent's property after annulment in appointee under section* 37 *of the Act—Creditor if entitled to prove his debt before him.*

A final decree was passed against a debtor on 19th December, 1929. The debtor was adjudged insolvent on 30th March, 1930. The adjudication was annulled under section 43 of the Provincial Insolvency Act on 9th December, 1942 and subsequently on 26th March, 1943 an affidavit was filed on behalf of *X* the legal representative of the decree-holder in the Subordinate Judge's Court alleging in the application for bringing *X* on record as the legal representative that an amount of Rs. 1,600 was due to him by the insolvent under the decree of 1927. In an appeal by *X* against the order of annulment of adjudication of the debtor, the order of annulment was confirmed but the property of the debtor was directed to vest in the Official Receiver for one year from 9th December, 1942, under section 37 of the Provincial Insolvency Act. On 11th October, 1943, *X* for the first time filed an affidavit before the Official Receiver proving his claim and the Official Receiver admitted the same on 25th November, 1943. On 16th April, 1943, *X* filed an execution petition more than 13 years after the final decree in favour of his father. The petition was dismissed as not pressed on 4th October, 1943. Then another execution petition was filed on 6th December, 1944. On a question of limitation,

Held :(1) The provisions of the Provincial Insolvency Act contemplate the proof of debts only between the date of adjudication and the date of the order of annulment. The proviso to section 78 refers only to the debts proved during the pendency of the insolvency proceedings. The affidavit filed on behalf of *X* in the subordinate Judge's Court on 26th March, 1943, cannot be considered to be "proof" of the debt as it was filed after the date of annulment. The fact of the vesting of the property in the Official Receiver under section 37 cannot make the insolvency proceedings "pending" during such period so as to make *X*'s debt "proved" before the annulment. The appointee under section 37 has no right to accept proofs of debts or pay any creditor whose debt has already become barred. As there was no proof of the debt during the pendency of the insolvency the proviso to section 78 of the Provincial Insolvency Act will not apply to save execution and accordingly execution of the decree is barred by limitation.

M. S. Venkatarama Aiyar for Appellant.

Respondent not represented.

K.S. ——— *Appeal dismissed.*

Subbà Rao and Panchapakesa Ayyar, JJ. Andi Thevan, *In re.*
7th December, 1948. Reference No. 3 of 1948.

Criminal Procedure Code (V of 1898), *section* 307—*Reference under—Interference by High Court with verdict of jury—Grounds.*

The High Court, in a reference made under section 307, Criminal Procedure Code, can interfere with the verdict of the jury only if the verdict is such that no reasonable man would come to that conclusion, or to put it in other words, the verdict is perverse.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

Accused not appearing in person or by counsel.

K.S. *Reference rejected.*

Mack, J. Seshayya *v.* Seetharamamma.
8th December, 1948. S. A. No. 324 of 1946.

Madras Hindu Religious Endowments Act (II of 1927), *section* 58—*Scope and effect —Swastivachakam service inam—Succession—Woman—No disqualification—Partition of emoluments—If can be recognised in making appointment to office.*

It may be that in the past, service inams of a hereditary character have been for the purposes of enjoyment divided between members of a family and that in such cases it may not always be possible to put the clock back, and insist on only one office-holder for a registered religious inam service.

It is illegal for a trustee to recognise any partition of a service inam subsequent to the enactment of section 58 of the Madras Hindu Religious Endowments Act. This section gives an office-holder or his family no such right. The section merely recognises a hereditary right to the office in the office-holder's family. That simply means that when a registered and unrecognised office-holder dies the vacancy shall be filled up *ceteris paribus* subject to the provisions of section 58 by the next in the line of succession. If the next in the line of succession happens to be a woman, for instance and if a daughter has to be preferred to a divided brother she certainly is entitled to the office and can perform it by proxy. It follows from this that no suit on the basis of any partition of a religious service inam (in this case swastivachakam service) will lie subsequent to the enactment of section 58 of the Act. If the hereditary office-holder of an inam is permitted to partition the inam amongst his family, and each member of the family in turn allowed to partition, the service inam will in a few generations be so fragmented and responsibility for service so divided that the religious service will become impossible of performance and enforcement.

B. V. Ramanarasu for Appellant.

P. Satyanarayana Raju and *M. B. Rama Sarma* for Respondents.

K.S. *Appeal dismissed. Leave refused.*

Satyanarayana Rao, J. Hanuman Prasad Pragdos *v.* Nanjappa Chetty & Sons.
8th December, 1948. C. C. C. A. No. 35 of 1947.

Sale of Goods—Contract for—Arrangement for despatch of the goods by seller F. O. R. Mirzapur and that Railway receipt should be negotiated through a named Bank of Madras —Breach of contract by seller—Suit for damages in Madras—Jurisdiction—Damages—If to be based on market rate at Mirzapur or at Madras on date of breach.

Where the arrangement was that the defendant should despatch goods F. O. R. Mirzapur and that the railway receipt should be negotiated through a Bank in Madras, and there is a breach of contract by the defendant, the Court in Madras had undoubted jurisdiction to try the suit for damages. The damages also have to be assessed according to the market rate in Madras, as the performance of the contract and the payment for the goods were at Madras and not at Mirzapur.

P. V. Subramaniam for Appellant.

P. N. Sundaresan and *T. Srinivasaraghavan* for Respondents.

K.S. *Appeal dismissed.*

Rajagopalan, J. Kalliammal *v.* Ramaswami Goundan

8th December, 1948. C. R. P. No. 623 of 1947.

Civil Procedure Code (V of 1908), *Order* 32, *rule* 3 (1) *and* (2) *and Order* 33—*Competence of next friend of minor instituting the suit—Cannot be the subject-matter of investigation at the stage of granting leave to sue* in forma pauperis *or any other stage of the suit.*

The competence of a next friend of a minor instituting a suit could not be the subject-matter of investigation either at the stage of granting leave to sue *in forma pauperis* or for the matter of that at any other stage of the suit. The next friend as such does not need to ask for sanction of the Court to recognise him as the next friend of the minor if he is not incapacitated in any of the ways indicated in Order 32, rule 3, clause 1, of the Civil Procedure Code. The next friend has a right to institute a suit and maintain that suit on behalf of the minor. Accordingly, an application by a next friend for leave to sue *in forma pauperis*, cannot be refused on the ground that the father and mother of the minor were alive and the next friend was not the minor's guardian at law.

R. Ramamurthi Aiyar for Petitioner.

K. Vittal Rao for Respondent.

K.S. ——— *Petition allowed and remanded.*

Horwill and Govinda Menon, JJ. Seethiah *v.* Venkatasubbiah.

10*th December*, 1948. O. S. A. No. 12 of 1948.

Companies—Petition for compulsory winding up in the Original Side of the High Court—Oral evidence—If and how far admissible—Costs—Discretion.

Winding up—Mere difference of opinion among majority directors and minority directors—If sufficient for compulsory winding up.

There is no inflexible rule or practice prohibiting the adducing of oral evidence or the cross-examination of the deponents of affidavits in original petitions before the High Court, such as for compulsory winding up of companies. Where necessity suggests or expediency requires, it is open to the Judge trying winding up proceedings to allow oral evidence.

48 M.L.J. 118 : I.L.R. 48 Mad. 448 and 52 M.L.J. 338 : L.R. 54 I.A. 68 : I.L.R. 50 Mad. 180 (P.C.), relied on.

Relevant statutory provisions and English practice considered.

But where the application for cross-examining the deponents of affidavits are made only at a late stage in the hearing and tend to retard and delay the progress of the application, the Court has the discretion to grant or not to grant an adjournment for getting the deponents of affidavits for cross-examination. As expedition is absolutely necessary in a winding up petition, the Court will be exercising a proper discretion in refusing an adjournment having a dilatory tendency.

The Court has a discretion to award costs to a creditor appearing in support of a winding up petition.

In the absence of evidence of misappropriation or malversation of funds by the management, a company should not be wound up merely on account of differences of views between the majority directors and the minority directors.

K. Krishnaswami Aiyangar and *N. C. Raghavachari* for Appellant.

C. V. Dikshitulu, V. Radhakrishnayya, B. Lakshminarayana, S. Subbiah, N. Rajeswara Rao, V. K. Thiruvenkatachari, K. Krishnamurthi and *G. Suryanarayana* for Respondents.

K.S. ——— *Appeal dismissed.*

Subba Rao and Panchapakesa Ayyar, JJ. Ramanathan Chettiar *v.* Subramanian Chettiar.
1st December, 1948. Appeal No. 451 of 1945.

Limitation Act (IX of 1908), *Article* 89—*Applicability—Conditions necessary for—Demand and refusal—Necessity.*

If there is a demand, if a refusal, express or implied can be deduced from the subsequent conduct of the parties and from the failure to reply to the demand, then limitation will operate ; but not otherwise. It cannot be said that limitation would begin to run, under Article 89 of the Limitation Act, *from the date of the demand*, once it is proved that there was no reply.

58 M.L.J. 45 (P.C.) and 43 Cal. 248, explained.

A. Sundaram Aiyar for Appellant.

V. Ramaswami Aiyar, G. R. Jagadisa Aiyar and *M. Natesan* for Respondents.

K.S. ——— *Appeal allowed.*

Rajamannar, C.J. and Viswanatha Sastri, J. Karuppa Chetty Goundan *v.* Board of Commissioners for Hindu Religious Endowments.
6th December, 1948. C. M. P. No. 6334 of 1948.

Certiorari—*Writ of—If can be issued by the High Court to quash the order of Madras Hindu Religious Endowments Board removing trustee of a temple in the mofussil—Jurisdiction.*

The High Court has no jurisdiction to issue a writ of *certiorari* to quash the order of the Madras Hindu Religious Endowments Board by which a person was removed from the office of the trustee of a temple in the Salem District. By the mere location of its office in the Presidency Town the Madras Hindu Religious Endowments Board cannot be deemed to be an inhabitant thereof within the meaning of section 8 of the Letters Patent. Nor can it be said that the subject-matter of dispute was one which can be said to have arisen in the Presidency town. The subject-matter in dispute in the case is the right to the office of trustee in a mofussil town.

I.L.R. 1944 Mad. 457, followed and (1948) 1 M.L.J. 322 (325) distinguished.

R. Ramamurthi Aiyar and *T. R. Venkataraman* for Petitioner.

M. Seshachalapathi, M. Chockalingam and *V. Sankaran* for Respondents.

K.S. ——— *Application dismissed.*

Satyanarayana Rao, J. Munia Goundan *v.* Varadaraja Goundan.
6th December, 1948. C. R. P. No. 1768 of 1948.
(A. A. A. O. No. 232 of 1946 converted into C. R. P.).

Execution—Attachment and sale in execution of second defendant's property before exhausting remedy against other defendants as provided in decree—Sale a nullity and does not require to be set aside within 30 *days under Article* 166 *of the Limitation Act.*

Where under the decree the decree-holder had no right to attach or bring the property of the second defendant to sale unless and until he exhausted his remedy against the properties of the other defendants, until then there is really no attachable decree against the second defendant (a Hindu son in the present case). Attachment and sale of the property of the second defendant contrary to the terms of the decree before exhausting the remedy against the other defendants and without proper notice to the second defendant will be a nullity and it does not require to be set aside within thirty days under Article 166 of the Limitation Act. The sale being a nullity must be set aside to the extent of the second defendant's interest in the item sold.

(1944) 2 M.L.J. 8, relied on ; *obiter* in 27 M.L.J. 605, not followed ; 1928 Mad. 140, distinguished.

K. Sankara Sastri for Appellant.

T. L. Venkatarama Aiyar for Respondent.

K.S. ——— *Petition allowed.*

Satyanarayana Rao, J. Shanmughavelayudam Pillai *v.* Ramanathan Chettiar.
9th December, 1948. A. A. A. O. No. 248 of 1946.

Madras Debt Conciliation Act (XI of 1936), *section* 10 (2) (B)—*Discharge of debt under—Conditions necessary for.*

A debt shall be deemed to have been discharged under section 10 (2) (*B*) of the Madras Debt Conciliation Act only when there has been service of notice contemplated by section 10 (1) of the Act calling upon every creditor to submit a statement of debts owed to him by the debtor with a view to effect a settlement. A mere notice of the conciliation proceedings given in connection with an application for stay of execution of the decree under section 25 of the Act will not be sufficient. It is not enough to prove that the creditor had knowledge of the proceedings under the Debt Conciliation Act. The debtor must prove the creditor's failure to comply with the requirements of the statute as laid down in section 10 (1). It is only then that the penal consequence of discharging the debt under section 10 (2) (*B*) would follow.

T. K. Subramania Pillai for Appellant.

K. V. Ramachandra Aiyar for Respondent.

K.S. ——— *Appeal dismissed.*

Mack, J. Ammanna *v.* Satteyya.

9th December, 1948. C. R. P. No. 107 of 1947.

Madras Hindu Religious Endowments Act (II of 1927), *section* 78—*Summary order on* prima facie *title ordering possession to be delivered to trustees—How far binding.*

Where title to certain lands belonging to a trust has been determined by an order under section 78 of the Hindu Religious Endowments Act, summary though it be, until that order is set aside in a properly constituted suit, it is binding on all the parties concerned. It would be a strange proposition of law to expect a party who has succeeded, though in a summary order, in obtaining possession on the basis of *prima facie* title to sue again to establish title as against persons whom he made parties in the summary proceedings. A lessee from the successful trustee can sue for recovery of the usufruct of the land from a lessee of the unsuccessful defendant without impleading his lessor.

V. Viyyanna for Petitioner.

V. Parthasarthy for Respondent.

K.S. ——— *Petition allowed.*

Horwill, J. Manjunatha Vaikunta Shanboghe *v.* Francis Andrew Fernandes.

10th December, 1948. C. R. P. No. 214 of 1947.

Deccan Agriculturists' Relief Act (XVII of 1879), *sections* 11 *and* 3 (w)—*Suit of the description mentioned in section* 3 (w)—*Cannot be filed in any other Court except the one within whose local limits the agriculturist defendant resides.*

Under section 11 of the Deccan Agriculturists' Relief Act, suits of the description mentioned in section 3 (*w*) of the Act may be filed, if the defendant is an agriculturist in the Court within whose local limits the defendant resides and not elsewhere.

K. P. Sarvothama Rao for Petitioner.

S. J. S. Fernandez for Respondent.

K.S. ——— *Petition dismissed.*

Mack, J. Kotayya *v.* Devayya.

10th December, 1948. C. R. P. No. 1082 of 1947.

Court-Fees Act (VII of 1870), *section* 11 *and Civil Procedure Code (V of* 1908), *section* 148—*Order for payment of additional Court-fees in respect of mesne profits decreed—Direction that if Court-fee ordered is not paid in the time allowed petition for ascertaining mesne profits would stand dismissed—Propriety.*

Section 11 of the Court-Fees Act clearly confers quite apart from section 148, Civil Procedure Code, a statutory discretion on a Court to extend the time for payment, if the Court-fee is not paid within the time prescribed. The Court could not and should not deprive itself of this discretion in anticipation by stipulating that in any circumstances the suit will be dismissed if the additional Court-fee is not paid within the time prescribed. For the discretion conferred by section 11 to come into operation there must be an application for extension of

time tendering a sufficient cause, on which a judicial mind has got to be brought to bear. In a petition for ascertaining mesne profits after a decree has been passed, in making an order for payment of additional Court-fees, it is improper to make a direction that if the petitioner failed to pay additional Court-fee by a certain date the petition would stand dismissed.

(1941) 1 M.L.J. 638, distinguished.

P. Satyanarayana Raju for Petitioner.

N. Subramanyam for Respondent.

K.S. ——— *Petition allowed.*

Rajamannar, C.J. and Viswanatha Sastri, J. Tirumal Rao *v.* Ranganatha Mudaliar.
13th December, 1948. C. M. P. No. 6277 of 1948.

Madras Buildings (Lease and Rent Control) Act (XV of 1946)—*Tenant passing letter that he would give complete possession by that night when faced with a warrant of possession in execution of the Rent Controller's order for eviction—If bars an appeal against the order or eviction.*

When the landlord who had obtained an order for eviction against his tenant took out a warrant of possession the tenant passed a letter to the landlord in the following terms :

> " As you have brought a warrant of possession against me . . .I request you time for to-day and I assure you that I will give complete possession of the said place by to-night."

The tenant did not give possession but two days later filed an appeal and obtained an order for stay of delivery. When the appeal came on for hearing it was dismissed on the ground that in the letter the tenant had accepted the order of the Rent Controller and that it was not open to him to reprobate by filing the appeal. In an application for quashing such order,

Held, merely because the tenant prayed for and obtained time to comply with the order of eviction passed by the Rent Controller it cannot be said that he had elected to treat the order of the Rent Controller as final or that he had abandoned his right of appeal. Hence the appeal was maintainable as the tenant had not either expressly or by implication abandoned his right of appeal.

S. Suryaprakasam and *P. V. Ramachandra Rao* for Petitioner.

N. Suryanarayana for Respondent.

K.S. ——— *Order quashed.*

Mack, J. Manikya Rao *v.* Adenna.
14th December, 1948. C. R. P. No. 1060 of 1947.

Trust—Lease by all the trustees—Death of some trustees—Surviving trustee if can sue for arrears of rent without impleading legal representatives of the deceased trustees.

One trustee after the death of his co-trustees can sue a tenant who took a land belonging to the trust on lease for recovery of arrears of rent. It is not necessary to implead the legal representatives of the deceased co-trustees as parties to the suit.

P. Satyanarayana Raju for Petitioner.

G. Venkatarama Sastri for Respondent.

K.S. ——— *Petition allowed.*

Somasundaram, J. Bapputhy, *In re.*
16th December, 1948. Crl. R. C. No. 57 of 1948.
(Crl. R. P. No. 53 of 1948).

Essential Supplies Temporary Powers Act (XXIV of 1946), *section* 17 (ii)—*Act received assent of Governor-General on* 19*th November,* 1946 *repealing Ordinance XVIII of* 1946—*G. O. No.* 1026, *dated* 19*th November,* 1946, *purporting to be issued under Ordinance XVIII of* 1946—*Validity—Contravention of notification—If offence.*

Act XXIV of 1946, repealing Ordinance XVIII of 1946, received the assent of the Governor-General on 19th November, 1946, and the Ordinance therefore expired by 12 midnight on 18th November, 1946. G. O. No. 1026, dated 19th

November, 1946 (which fixed the price of cane jaggery) purporting to be issued under the Ordinance XVIII of 1948, came into effect only after its publication in the gazette on 19th November, 1946. Since that Ordinance had already expired the notification could not have been issued under section 3 (1) of the Ordinance. In the absence of a further notification under the provisions of Act XXIV of 1946, the notification will have no validity. It is only orders issued under the previous Ordinance that are saved by section 17 (*ii*) of Act XXIV of 1946. A person cannot be convicted for the violation of the provisions of that notification.

K. S. Jayarama Aiyar and *C. K. Venkatanarasimham* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ——— *Conviction and sentence set aside.*

Satyanarayana Rao, J. Satyanarayana Sreshti *v.* Ramamurti Sreshti.
17th December, 1948. S. A. No. 428 of 1946.

Registration Act (XVI of 1908), *sections* 35 *and* 87—*Father and mother jointly entitled to sell executing sale deed—Death of mother—Registration on admission of execution by father and not the heirs of the mother—Defect curable under section* 87.

Where a father and mother obtain a joint right to alienate some property under a compromise decree and execute a sale deed but the mother died and the father admitted execution by the mother also before the registrar when the vendee presented the deed for registration and the registrar registered the same, the defect can only be one of procedure and not an illegality vitiating the registration of the document.

I.L.R. 23 Mad. 580, 66 M.L.J. 677, I.L.R. 47 All. 294, A.I.R. 1926 Bom. 137 and I.L.R. 58 Cal. 876, relied on.

I.L.R. 37 All. 49 (P.C.) considered and Mullas' Commentary on the Registration Act, 3rd edition, pages 151 and 152 dissented from.

M. Appa Rao for Appellant.

V. Viyyanna for Respondent.

K.S. ——— *Appeal dismissed.*

Rajamannar, C.J. and Viswanatha Sastri, J. Chakrapani Aiyar *v.* Ammalu Amma.
17th December, 1948. C. M. P. No. 5347 of 1948.

Civil Procedure Code (V of 1908), *Order* 22, *rules* 10 *and* 11—*Assignment of interest during pendency of suit—Assignor not defending appeal—Right of assignee to be brought on record to defend appeal.*

The person to or upon whom an interest has come or devolved during the pendency of a suit or appeal is bound by the decision in the suit or appeal, though *eo nomine* he is not added as a party. But there is nothing to prevent a suit or appeal being continued without such person being brought on record. It is only when the presence of such person on record becomes necessary owing to special circumstances that the Court may be inclined to permit such persons to be brought on record. It may be the person himself may apprehend that his interest may not be sufficiently safeguarded by the parties on record, or the other side may desire to obviate any trouble or obstruction in execution proceedings. Mere omission to make an application under Order 22, rule 10, C. P. C., will not by itself lead to any consequences, will not confer any right on parties or take away any rights from them. Accordingly there is no reason why a person in whose favour a transfer is made during the pendency of a suit should not choose to come on record only at the stage of an appeal or second appeal, if and when he considers that his presence has become necessary. The provisions of order 22, rules 10 and 11 are of an enabling character. There is nothing in them to compel an action at the risk of the loss of any right.

(1938) 1 M.L.J. 882 and A.I.R. 1946 Lah. 33, approved.

(1940) 2 M.L.J. 349, overruled.

C. S. Swaminathan for Petitioner.

N. Sundaram Iyer for Respondents.

K.S. ——— *Peetition allowd.*

Satyanarayana Rao, J. Kasi Ammal *v.* Ramaswami Reddiar
8th December, 1948. S.A. No. 430 of 1946.

Evidence Act (I of 1872), *section* 112—*Evidence of husband that he had no intercourse with mother of his alleged child—How far proof of " non-access."*

If a husband had an opportunity of intercourse with his wife, but notwithstanding such opportunity if the husband proves to the satisfaction of the Court that he had no intercourse he establishes thereby " non-access " within the meaning of section 112 of the Evidence Act. The English rule that evidence of the husband is not admissible in bastardy proceedings does not apply to India and the evidence of the husband cannot be ruled out.

V. Ramaswami Aiyar and *R. M. Halasyam* for Appellant.

T. L. Venkatarama Aiyar for Respondents.

K.S. ——— *Appeal dismissed. No leave.*

Rajamannar, C.J. and Somasundaram, J. Sitharamamurthi Chetty *v.* Guruswami Chetti.
10*th December,* 1948. App. No. 609 of 1946.

Partnership—Renewal of lease obtained by one of the partners in his own name—Presumption—Right of other partners—Trusts Act (II of 1882), *sections* 88 *and* 90—*Applicability.*

The renewal of a lease of the partnership property by one or more of the partners without the privity of the others enures for the benefit of all. The law is substantially the same in India as in England and it is contained in sections 88 and 90 of the Indian Trusts Act. There is no irrebuttable presumption of law that a renewal of a lease belonging to the partnership by one of the partners enures to the benefit of all the partners. A partner no doubt occupies a fiduciary position in relation to the other partners in the affairs of the firm, but he does not suffer under an absolute disability by virtue of his position to acquire any benefit or advantage for himself in any circumstances. There may be cases when a partner, during the continuance of a partnership, can secure a new lease to himself without the new lease being held to be for the benefit of the partnership. It would depend upon the facts and circumstances in each case. In the case of trustees and personal representatives the presumption of personal incapacity to retain the benefit is treated as irrebuttable, inasmuch as the basis of the presumption is considered to be public policy. But, in the case of mortgagees, joint tenants and partners the presumption is treated as rebuttable and depends upon the facts and circumstances of each case.

English and Indian case-law discussed.

T. L. Venkatarama Aiyar, Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for Appellants.

The Advocate-General (*K. Rajah Aiyar*), *Alladi Krishnaswami Aiyar, K. Bhimasankaram* and *B. V. Subramaniam* for Respondents.

K.S. ——— *Appeal allowed in part.*

Rajamannar, C.J. and Viswanatha Sastri, J. Arunagiri Goundan *v.* Vasantharoya Goundan.
13*th December,* 1948. Appeal No. 3 of 1946.

Civil Procedure Code (V of 1908), *Order* 10, *rule* 2—*Examination of party under—Nature and scope of—Defendant summoned as court-witness and examined before close of plaintiff's evidence—Not proper.*

The examination under Order 10, rule 2, does not provide for an examination on oath. The provision was intended to be used to elucidate the matters in controversy in suit before the trial began. This is not a provision intended to be used to supersede the usual procedure followed at the trial as prescribed in Order 18. 35 C.W.N. 925 (927) P.C. relied on.

It is accordingly not proper to summon and examine the defendant as a Court witness before the examination of plaintiff's witnesses has closed.

C. S. Venkatachari and *D. Ramaswami Aiyangar* for Appellant.
T. Thyagaraja Aiyar for Respondents.

K.S. ——— *Appeal dismissed.*

Subba Rao and *Panchapakesa Ayyar, JJ.* Krishnaswami Reddiar *v.* Venugopala Reddiar.
14th December, 1948. Appeal No. 504 of 1945.

Hindu Law—Adoption—Burden of proof—Adoption of orphan—Invalid.

Legal Practitioners Act (XVIII of 1879), *Rules* 30 *and* 31*—Senior engaged becoming ill and another senior engaged—Both certifying for fees received by each—Juniors if entitled to one third of the aggregate amount.*

Any person who seeks to displace the natural succession of property by alleging an adoption must discharge the burden that lies upon him by proof of the factum of adoption and the performance of any necessary ceremonies as well as all such facts as are necessary to constitute a valid adoption. Where the adopted boy was an oprhan on the date of adoption the adoption will be invalid.

Joharmal v. *Soni Bai,* (1925) 49 M.L.J. 173 : L.R. 52 I.A. 231 (P.C.).

Where the senior counsel engaged became ill and a new senior was engaged and both together certified as having received a specified amount it cannot be said that under the rules there cannot be two seniors and therefore one of them must be a senior and the other a junior and that the Court can award the amount for which the senior had certified plus one third of the amount payable under rule 31 of the Legal Practitioners Act Rules towards the junior fees.

For the purpose of the application of the Legal Practitioners' Rules both the Counsel engaged successively must be treated as seniors and under rule 33 the uniors would be entitled to one third of the aggregate fee payable to the two seniors.

K. S. Sankara Aiyar and *V. Sundaresan* for Appellant.

T. V. Muthukrishna Aiyar, A. Krishnaswami Aiyar, K. G. Srinivasa Aiyar, K. G. Narayanaswami Aiyar, S. Amudachari, T. V. Ramanatha Aiyar and *L. V. Krishnaswami Aiyar* for Respondents.

K.S. ——— *Appeal dismissed.*

Horwill and Govinda Menon, JJ. Viriah *v.* Subba Rao.
15th December, 1948. A.A.O. No. 587 of 1946.

Civil Procedure Code (V of 1908), *Order* 21, *rule* 58*—Person who failed in application under—Not barred from applying under Order* 21, *rule* 89, *to have the sale set aside.*

A person who has failed in an application under Order 21, rule 58 of the Civil Procedure Code can still file an application to have the sale set aside by depositing the decree amount plus the necessary poundage, etc., under Order 21, rule 89. The decision in the earlier application will not operate as *res judicata* to bar the application under Order 21, rule 89.

V. Subramanyam for Appellant.

N. Subrahmanyam, A. Raghaviah and *G. Venkatarama Sastri* for Respondents.

K.S. ——— *Appeal allowed.*

Panchapakesa Ayyar, J. Amirtheen Rowther *v.* Ameena Bivi Ammal.
17th December, 1948. A.A.A.O. No. 11 of 1948.

Limitation—Execution applications against principal judgment-debtor—Will save limitation as against the sureties.

Execution against the principal debtor will save limitation for execution against his surety. (1934) 58 Mad. 276 followed, (1943) 2 M.L.J. 444 dissented from.

G. Jagadisa Aiyar for Appellant.
M. S. Venkataramier for Respondent.

K.S. ——— *Appeal allowed. Leave granted.*

Rajamannar, C.J. and Viswanatha Sastri, J. Kasi *v.* Ramanathan Chettiar.
17th *December*, 1948. Appeal No. 455 of 1946.

Partnership—Death of partner—Rights of representatives and obligations of surviving partners—Nature of relationship.

The obligation of a surviving partner in a dissolved firm to the representatives of a deceased partner, are not more onerous than those of a partner to his other partners in a running partnership. A partner though an agent is, in no sense, a trustee for his co-partner. He has no higher duty than to deal fairly and honestly with him. He is bound to indemnify his co-partners for any loss caused by his fraud and is liable in the absence of a contract to the contrary, to account to them for profits earned by him by use of the firm's property or by carrying on a competing business. If he clandestinely secures a personal profit to himself in a partnership transaction, he must share the profit with the other partners. He is not in the position of an insurer or a guarantor of his other partners. He is under no positive duty to make or earn a profit or avert a loss in the conduct of the partnership business. All that the law imposes on him is an obligation of good faith and all that is required of him is that he must not act in a manner antagonistic or prejudicial to the interests of the firm. Each partner being entitled to manage and act in the absence of a provision to the contrary in the articles, no one partner can be considered to be a trustee for the others.

After dissolution, the partnership continues only for the purpose of winding up the business, realising the assets, discharing liabilities and adjusting the rights of the partners. The authority, rights and obligations of the partners continue only for this limited purpose. On a dissolution by the death of a partner the representative of the deceased partner is entitled to call upon the surviving partners to account for the deceased partner's share as it stood on his death and to have his claim satisfied out of the assets of the dissolved partnership after discharging all liabilities incurred before dissolution and such only of the liabilities incurred thereafter by the suriving partners, as are incidental to and necessary for the winding up of the business. The surviving partners have the right and duty to realise the partnership property and in this sense and for this purpose, they hold a fiduciary relationship towards the deceased partner's representative as regards his interest in the partnership property.

The claim of the representative of a deceased partner must be for profits alone or interest alone. A mixed claim is inadmissible and there cannot be a claim for profits for part of the time over which the dealings of the surviving partners extended and interest as to the other part.

K. Bhashyam and *S. Venkatesa Aiyangar* for Appellants.

T. M. Krishnaswami Ayyar and *S. Thiagaraja Aiyar* for Respondents.

K.S. *Decree modified and appeal otherwise dismissed.*

Subba Rao and Panchapakesa Ayyar, JJ. Subbai Goundar *v.* Muthuswami Goundar.
17th December, 1948. Appeal No. 512 of 1945.

Specific Relief Act (I of 1897), *section* 27 (b)—*Subsequent alienee who has not paid the entire amount of consideration—Not entitled to resist claim for specific performance of earlier agreement to sell.*

An alienee is not entitled to the equity under section 27 of the Specific Relief Act unless the entire amount of consideration is paid. The mere fact that a tender has been illegally refused does not give it a higher sanctity and does not convert what is a tender into a payment.

K. S. Ramamurthi for Appellant.

T. V. Ramanatha Aiyar and *T. K. Subramania Pillai* for Respondents.

K.S. *Appeal allowed.*

Somasundaram, J. Bhujanga Naidu *v.* Kristnama Naidu.
3rd January, 1949. Crl. M. P. No. 1627 of 1948.

Madras Village Courts Act (I of 1889), *section* 77—*If detracts from the ordinary power of the High Court to transfer a case from one subordinate Court (Village Court) to another —Letters Patent (Madras), clauses* 22 *and* 29—*Applicability.*

Per Govinda Menon, J., when the matter came on for hearing in the first instance on 18th August, 1948 :—Under clause 29 of the Letters Patent the High Court has power to transfer a criminal case from any Court to any other Court of equal or superior jurisdiction and therefore an application for transfer of a case in a panchayat Court to any other Court of equal or superior jurisdiction is sustainable.

The thorny question as to how far the prohibition contained in section 77 of the Madras Village Courts Act (that save as provided in sub-section (1) nothing contained in the Criminal Procedure Code shall apply to a village Court) detracts from the ordinary power of the High Court to transfer a case from one subordinate Court to another was left open.

Somasundaram, J., on 3rd January, 1949, made the final order transferring the case from the file of the panchayat Court and directing that the District Magistrate will transfer it to some other panchayat Court or sub-Magistrate.

K. Venkatarama Raju for Petitioner.

N. T. Raghunathan for the Public Prosecutor (*V.L. Ethiraj*) on behalf of the Crown.

R. Ramachandra Reddi for Respondent.

K.S. *Petition allowed.*

Subba Rao and Panchapakesa Ayyar, JJ. Chelliah, *In re.*
7th January, 1949. Cr. A. No. 473 of 1948.

Madras Borstal Schools Act (V of 1926), *section* 8—*Scope—Adolescent offender with criminal tendencies—Covered by section* 8—*Offender guilty of causing grievous hurt or death—If can be sent to Borstal institution.*

All adolescent with criminal tendencies will clearly be covered by section 8 of the Madras Borstal Schools Act. Decision in (1948) 2 M.L.J. 630, preferred to the different views taken in some other rulings. The very fact that a young boy dealt heavy injuries to the deceased for a very petty reason and threw the dead body into a well, will show pronounced criminal tendencies and propensities in him. Also it is somewhat inequitable to send adolescents with records of thefts, cheating and criminal tendencies of that type alone to the Borstal School and to send adolescents with different criminal tendencies as for example causing grievous hurt or death to the ordinary jail, with the far greater hardships involved and the lesser facilities for reformation and of settlement in life by teaching a useful occupation.

K. P. Raman Menon for Appellant.

The Crown Prosecutor (*Govind Swaminathan*) for the Public Prosecutor on behalf of the Crown.

K.S. *Appeal allowed.*

Subba Rao and Panchapakesa Ayyar, JJ. Muruga Goundan, *In re.*
10th January, 1949. R.T. No. 109 of 1948.

Criminal trial—Witness giving different versions before Magistrate's Court and the Sessions Court—Conviction on such evidence—When proper.

It is very unsafe to convict an accused only on the evidence of persons who gave one version at the Magistrate's Court and a totally different version before the Sessions Court, unless there is other reliable evidence in support of the prosecution case.

Harnam Singh v. *Emperor,* A.I.R. 1937 Lah. 597, approved.

Mohammed Hibbathullah for the accused.

The Crown Prosecutor (*Govind Swaminathan*) for the Public Prosecutor.

K.S. *Accused acquitted.*

Horwill and Govinda Menon, JJ. Eswaran *v.* Superintendent, Central Jail, Vellore.
25th November, 1948. Cr.M.P. Nos. 2128 to 2131 of 1948.

Madras Maintenance of Public Order Act (I of 1947), *section* 3 (5)—*Duty of Government to pass a final order under after report of Advisory Council—Failure to pass final orders—Makes detention unlawful.*

An order was passed by His Excellency the Governor in the following terms :— " In exercise of the powers conferred by section 4 (1) of the Madras Maintenance of Public Order Act (I of 1947), His Excellency the Governor of Madras hereby directs that the order . . . . issued by the District Magistrate of Coimbatore under section 2 (1) (*a*) of the said Act directing that *X* be detained shall be cancelled and that the said *X* shall be released immediately on condition that he gives a written undertaking and executes a bond for Rs. 500 with a surety for a like amount to the satisfaction of the District Magistrate of Coimbatore to dissociate from communist and other allied organisations, and not to take part in subversive activities of any kind either directly or through intermediaries."

It was argued that this order was intended to be a final order setting aside the previous order under section 2 (1) (*a*) by the exercise of the authority vested in the Government under section 4 (1) of Act I of 1947 and that the detenu must be released.

Held : Reading the order as a whole there is no doubt that the Government really meant that if the security bonds were-executed the Government would exercise their powers under section 4 (1) and set aside the order of detention. The condition applies both to the passing of an order under section 4 (1) as well as to the release of the detenu from jail. It cannot be said that there was an absolute order under section 4 (1). 1948 A.L.J. 381 and 1948 A.L.J. 396, distinguished.

It is the duty of the Government to place the matter before an Advisory Council after giving the person detained an opportunity of stating his case. After the Advisory Council has considered the materials placed before it and submitted its report it is the duty of the Government under section 3 (5) of the Act to pass an order confirming, modifying, or cancelling the order made under section 2 (1). If the Government does not conform with the requirements of section 3 (5) then the detenu will be unlawfully detained and he will be entitled to move the Court under section 491 of the Criminal Procedure Code.

N. S. Mani and *A. K. Pillai* for *Messrs. Row and Reddy* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. *Order accordingly.*

Panchapagesa Sastry, J. Rangaraja Rao *v.* Dulasibai Ammal.
7th January, 1949. A.A.O. No. 235 of 1947.

Madras Civil Courts Act (III of 1873), *section* 29 (1)—*Notification under by the High Court empowering a subordinate court to issue a succession certificate—Scope and effect—Issue of succession certificate by Subordinate Judge—Jurisdiction—Appeal—Forum —Succession Act (XXXIX of* 1925), *section* 388 (2) *proviso—Not applicable when subordinate court not invested with powers of High Court under that section.*

An appeal against an order of a Subordinate Judge in proceedings taken cognizance of by him by virtue of a notification under section 29 (1) of the Madras Civil Courts Act shall be only to the High Court irrespective of the pecuniary limits imposed by section 13 of the Madras Civil Courts Act. Where a Subordinate Judge thus empowered by a notification under section 29 (1) issues a succession certificate

an appeal lies to the High Court and not to the District Court. The proviso to sub-section (2) of section 388 of the Succession Act is inapplicable when there is no notification by the Provincial Government either under section 26 of the Succession Certificate Act (VII of 1889) or under section 388 of the Succession Act (XXXIX of 1925) investing a Subordinate Judge's Court with powers to exercise the functions of the District Court and it cannot be said that the forum of appeal will be the District Court and not the High Court.

The proper way of construing section 29 (1) of the Madras Civil Courts Act and section 388 of the Indian Succession Act is to say that the general words of section 29 (1) of the Madras Civil Courts Act should be limited to proceedings under the Succession Act, 1925, other than Part X for which the special provision in section 388 of the Act alone will apply. In this view the High Court notification under section 29 (1) of the Madras Civil Courts Act does not and cannot confer any power upon a Subordinate Judge as such to entertain applications under Part X of the Indian Succession Act, 1925, in the absence of a special notification under either the old section 26 of the Succession Certificate Act or the new section 388 of the Indian Succession Act. Accordingly the Subordinate Judge's Court has no jurisdiction to entertain an application for succession certificate and the issue of such a certificate by that Court is not a matter which can be cured by section 21 of the Code of Civil Procedure.

[The practice from 1939 appears to have been for Subordinate Judges' Courts as such to entertain applications under Part X of the Succession Act also].

R. Partha Rao for Appellant.

T. R. Srinivasan and *S. Goparatnam* for Respondent.

K.S. —————— *Appeal allowed.*

Viswanatha Sastri, J. Punnaiya *v.* Raghaviah.

7th January, 1949. A. A. O. No. 39 of 1947.

Mortgage decree—Costs—Mortgagor can be made personally liable for only after exhausting the mortgaged properties—Mortgagor—When can be proceeded against personally.

Mortgagors cannot be made personally liable for costs before the sale proceeds have proved insufficient to satisfy the mortgage claim including principal, interest and costs. *Maqbul Fatima* v. *Lalta Prasad,* I..L.R. 20 All. 523 and *Kamalamma* v. *Komandur Narasimhacharlu,* I.L.R. 30 Mad. 464, relied on.

Where the personal remedy is barred against the mortgagors and the hypotheca has not yet been exhausted and some items of the mortgaged property remain to be sold the mortgagee decree-holder cannot claim to proceed against the mortgagors personally by attaching his properties other than those mortgaged.

G. Chandrasekhara Sastri for Appellant.

B. V. Ramanarasu for Respondent.

K.S. —————— *Appeal dismissed.*

Satyanarayana Rao, J. Palani Ammal *v.* Sethurama Ayyangar.

10*th January,* 1949. S. A. No. 1480 of 1946.

Inam village—Gramantham—Right of inamdars—Right of one of the co-owners to sue for recovery of possession from a trespasser.

A co-owner is entitled to institute a suit in ejectment against a trespasser. I.L.R. 39 Mad. 501, relied on. Gramantham is not communal property in the

sense in which thrashing floor or burning grounds or other property is communal, that is property reserved for the use of the community. Gramantham if it is unoccupied is assigned from time to time by the proprietor whether it is in zamindari area or in an inam village. (1939) M.W.N. 207, referred to. The owners of the village will be entitled to all the porambokes except communal poramboke and as gramantham is not communal property one of the co-owners of the village would be entitled to institute a suit for recovery of possession from a trespasser.

K. V. Srinivasa Aiyar for Appellant.

R. Gopalaswami Aiyangar for Respondent.

K.S. ——— *Appeal dismissed. Leave refused.*

Horwill, J. Chinna Basamma *v.* Veerappa.
10*th January*, 1949. S. A. No. 558 of 1946.

Civil Procedure Code (V of 1908), *section* 66—*Applicability—Certified purchaser before* 1908—*Suit against person claiming under him alleging that the purchase was made benami for plaintiff—Not maintainable.*

A suit cannot be maintained against a certified purchaser or any one claiming through him on the ground that the purchase was made on behalf of the plaintiff whether the purchase was made before 1908 or afterwards.

I.L.R. 47 Cal. 1108, dissented from; I.L.R. 21 Mad. 7, 28 M.L.J. 251, 3 L.W. 86, reviewed and relied on.

Ch. Raghava Rao and *B. Srinivasamurthi* for Appellant.

A. C. Sampath Ayyangar and *S. Krishnaswami* for Respondents.

K.S. ——— *Appeal allowed.*

Panchapagesa Sastry, J. Kayambu Servai *v.* Karuppaiah Servai.
10*th January*, 1949. S. A. No. 547 of 1946.

Water rights—Ryot of particular village entitled to take water from tank for irrigation—Cannot get injunction restraining the landholder from taking water for irrigating lands in another village unless damages actual or prospective have been established.

A ryot of a particular village entitled to take water from a tank for irrigating his lands cannot get an injunction restraining the landholder from taking water from the tank for irrigating lands in another village unless damages actual or prospective have been established. The plaintiff must establish "probable prospective damage" and that the defendant's act is such as is likely to cause damage to him.

I.L.R. 16 Mad. 333, I.L.R. 32 Mad. 423 and I.L.R. 54 Mad. 793, referred to.

V. Ramaswami Aiyar for Appellant.

R. Subramania Ayyar, R. M. Halasyam and *T. Krishna Rao* for Respondents.

K.S. ——— *Appeal dismissed. Leave refused.*

Subba Rao and Panchapakesa Ayyar, JJ. Brahmayya, *In re.*
18*th January*, 1949. Crl. Appeal No. 568 of 1948.

Criminal trial—Confession—Elaborate manner of—Effect.

The elaborate manner in which a confession was made may well have been due to the fact, that the accused, in a penitent mood, intended to make a clean

breast of all the facts known to him. The fact that a confession is more elaborate than necessary or that it contains more particulars than are required at the particular stage does not necessarily show that the confession was not voluntary. A voluntary confession is legal and sufficient proof of guilt though in practice it may be unsafe to convict a person on a retracted confession alone.

A. Varadarajan amicus curiæ for accused.

The Crown Prosecutor (*Govind Swaminathan*) for the Public Prosecutor on behalf of the Crown.

K.S. ——— *Appeal dismissed.*

Horwill and Rajagopalan, JJ. Ramayya Pantulu *v.* Kutty and Rao, Ltd.
21st January, 1949. O. S. A. No. 69 of 1948.

Industrial Disputes Act (XIV of 1947), *sections* 7 *and* 10 (1)—*Government notification giving jurisdiction to a particular Tribunal over the whole of the Province with regard to disputes arising in engineering firms and type foundries—Validity—Absence of reference to disputes or specification of parties—If makes notification invalid.*

On 5th March, 1948, the Government of Madras issued a notification which ran thus : " Whereas industrial disputes have arisen between the workers and managements of certain engineering firms and type foundries in the Province of Madras and whereas industrial disputes are apprehended in the rest of the engineering firms and type foundries in respect of certain matters . . . . . in exercise of the powers conferred by section 7 (1) and (2) read with section 10 (1) (*c*) of the Industrial Disputes Act, 1947 . . . . His Excellency the Governor of Madras hereby constitutes an Industrial Tribunal consisting of one person, namely, Sri T. D. Ramiah Pantulu . . . . . . and directs that the said industrial disputes be referred to that Tribunal for adjudication."

Held :—(i) The notification is valid under section 7 of the Act, in that it gives jurisdiction to a particular Tribunal over the whole of the Province of Madras with regard to disputes arising in engineering firms and type foundries. (ii) A general notification of this kind (which does not refer to any specific disputes between any group of workers and managements nor contains any specification of the firms in which disputes between the management and the workers existed) is not competent under the Act. The Government must have reason to believe that in a particular business a definite dispute is known to exist or is apprehended by reason of demands and discussions taking place amongst the workers and management. (iii) The parties to a dispute must apply to the Government to refer the matter to a Tribunal and it is not competent to constitute a Tribunal leaving the parties to refer disputes which may arise to that Tribunal. (iv) In a reference made by the Government under section 10 (1), it is most desirable that the Government should state what points they consider are in dispute and should be adjudicated upon by the Tribunal.

The Advocate-General (*K. Rajah Aiyar*) instructed by the Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

B. V. Subramaniam, N. C. Srinivasan and *A. Ramachandran* for *Messrs. Row and Reddi* for Respondents.

K.S. ——— *Appeal dismissed.*

Satyanarayana Rao, J. Murugappa Chettiar *v.* Arunachala Goundan.
5*th January*, 1949. S.A. No. 565 of 1946.

Execution sale—Sale nullity as to one item—Right of auction purchaser to sue for refund of sale proceeds drawn out by creditors under section 73, *Civil Procedure Code* (*V of* 1908)—*Limitation.*

After the purchaser in execution sale had deposited the price which was distributed between various decree-holders who claimed rateable distribution and been put in possession the sale of one of the items was set aside at the instance of the Official Receiver in the insolvency of one of the debtors as that item was claimed to be the exclusive property of the insolvent. The auction purchaser was unsuccessful in his application to get a refund of the price paid. In a suit subsequently filed against the various decree-holders who had drawn out moneys by way of rateable distribution,

Held, that the suit was maintainable. As the sale of one item was held to be a nullity as regards one lot the purchaser will be entitled to sue to recover the purchase price paid by him. I.L.R. 59 Mad. 202 (F.B.), relied on. (1945) 1 M.L.J. 312, distinguished as a case where the sale of an item failed in part but was good as regards the rest.

Failure of consideration for the sale accrued only when the property was taken possession of by the original owner and not earlier, and the cause of action to institute the suit accrued and arose only when he was dispossessed and not when the sale was found to be void. I.L.R. 1944 Mad. 663, applied; 17 M.L.J. 298, relied on; A.I.R. 1941 Mad. 742; (1946) 2 M.L.J. 231, distinguished. Article 97 of the Limitation Act applied to the case.

K. V. Ramachandra Aiyar for Appellants.

V. C. Viraraghavan for Respondent.

K.S. *Appeal dismissed. No leave.*

Horwill and Rajagopalan, JJ. Muhammad Sukur Sahib *v.* Madhava Kurup.
7*th January*, 1949. L.P.A. No. 52 of 1943.

Madras Non-Residential Building Rent Control Order (1942 *as amended on* 11*th July*, 1944), *clause* 8 (10)—*Decree for ejectment in favour of owner of building on* 8*th September*, 1944, *passed apparently unaware of the amendment—Possession given on* 15*th September*, 1944—*Defendant bringing to notice of execution Court on* 28*th October*, 1944, *the amendment—Court's power to set aside order for possession—Clause* 8—*Retrospective operation.*

After 11th July, 1944, when Madras Non-Residential Building Rent Control Order, 1942, was amended no suits could be instituted for eviction of tenants; for by the new Act a landlord desirous of evicting his tenant would not file a suit, but would apply directly to the Rent Controller, who would proceed to hear the objections of the tenant and to decide the case in accordance with the principles laid down in clause 8 of the Control Order. Where a decree for eviction was passed after the amendment of the Control Order excluding jurisdiction of the ordinary Courts the landlord cannot execute his decree as clause 8 prohibited him from filing an execution petition in the Court, his only way of evicting the tenant being to file an application before the Rent Controller. It cannot be said that the amendment cannot affect pending proceedings and that the law as it stood when the suit was filed should be applied.

(1948) 2 M.L.J. 359, reversed.

S. R. Subramania Aiyar for Appellant.

S. V. Venkatasubrahmauyam for Respondent.

K.S. *Appeal allowed.*

NRC

Subba Rao and Panchapakesa Ayyar, JJ.
10th January, 1949.

Shanasuddin, *In re.*
Cr.A. Nos. 247, etc., of 1948.

Criminal trial—Evidence—Approver's evidence—Necessity for corroboration to sustain conviction—Criminal Procedure Code (*V of* 1898), *section* 411-*A—Appeal on facts—Scope.*

Where leave has been granted to appeal on the facts under section 411-A of the Code of Criminal Procedure the matter is at large and the Court of Appeal must dispose of the appeal on the merits, and the entire evidence must be gone into. I.L.R. 1948 Mad. 70 (P.C.), followed.

It is not advisable to convict the accused on the evidence of the approver alone, unless his evidence is corroborated in material particulars by the unimpeachable evidence in the case.

I.L.R. 27 Mad. 271, I.L.R. 1944 Mad. 308 and (1916) 2 K.B. 658, referred to.

A. Nagarajan and *A. Viswanathan* for Accused No. 3.

T. M. Kasturi and *A. K. Sriraman* for Accused Nos. 7 and 8.

S. Krishnamurthy and *Vepa P. Sarathy* for Accused Nos. 8 and 9.

J. Setha Mahalakshmi for Accused No. 4.

R. V. Seshadri for Accused Nos. 2 and 6.

T. R. Abdul Ghani and *S. S. Bharadwaj* for Accused No. 1.

The Crown Prosecutor (*S. Govind Swaminathan*) on behalf of the Crown.

Convictions of accused Nos. 5 *and* 8 *set aside and sentences on other accused reduced.*

K.S.

Satyanarayana Rao, J.
10th January, 1949.

Krishnamurthi Naidu *v.* Ramakrishna Naidu.
S. A. No. 472 of 1946.

Registration Act (*XVI of* 1908), *section* 17—*Compromise decree reciting that the defendant agrees to treat a will as valid with a statement that the defendant and his heirs would not question the will and that they had no interest in the properties—Not a declaration of plaintiff's title necessitating registration of the compromise decree.*

Where a clause in a compromise decree says that the defendant agrees to treat a will as valid and the defendant states that he and his heirs would not question the will and that they had no interest in the properties, it cannot be said that the decree requires registration as a declaration of the plaintiff's title to the suit properties. Nor does the language create any title under the document to the suit properties in favour of the plaintiff. The title of the plaintiff is derived under the will and not under the compromise decree. Such a compromise decree does not require registration.

62 M.L.J. 296 : I.L.R. 11 Pat. 272 (P.C.) and I.L.R. 5 Bom. 232, relied on.

N. Rajagopala Aiyangar for Appellant.

T. V. Ramanatha Aiyar and *A. Srirangachariar* for Respondent.

Appeal dismissed. No leave.

K.S.

Subba Rao and Panchapakesa Ayyar, JJ.
18th January, 1949.

Bapanayya *v.* Satyanarayana.
A. A. O. No. 609 of 1946.

Provincial Insolvency Act (*V of* 1920), *sections* 38 *and* 39—*Scheme of composition duly approved but adjudication not annulled by some oversight—Administration of estate on the ground that there was no annulment—Subsequent application for annulment—Sustainability.*

Where though a scheme of composition had been approved no order of annulment of adjudication was made due to some oversight and the administration in the insolvency had proceeded on the basis that there was no annulment of adjudication it is the duty of the Court when it is brought to its notice that there was an order by the Court approving the composition to annul the adjudication under section 39 of the Provincial Insolvency Act. To safeguard the interests of the creditors however the properties of the insolvent can be vested in the Official Receiver under section 39 of the Provincial Insolvency Act for a period of three years.

V. Parthasarathi and *B. Srinivasamurthi* for Appellant.

G. Balaparameswari Rao for Respondent.

K.S. *Appeal allowed.*

Rajamannar, C.J. and Viswanatha Sastri, J. Jalal Mohamed Ibrahim Sahib *v.*
18th January, 1949. Arni Abdul Samad Sahib.
C. M. P. No. 7266 of 1948.

Madras Buildings (Lease and Rent Control) Act (XV of 1946)—Small Cause Judge as Appellate Tribunal—Has no jurisdiction to set aside order of Rent Controller directing eviction of a tenant on a ground involving questions of fact and law raised for the first time before the Appellate Tribunal.

The Small Cause Judge, Madras, as the Appellate Tribunal under the Madras Buildings (Lease and Rent Control) Act has no jurisdiction to set aside the order of the Rent Controller (for eviction of a tenant) on a ground which involved both questions of fact and law (*e.g.*, that notice to quit had not been given) which had not been raised at any prior stage. Such an order of the Appellate Tribunal must therefore be quashed. Further the decision in (1948) 2 M.L.J. 391, saying that notice was necessary has now been reversed by a division bench.

M. S. Venkatarama Aiyar and *A. A. S. Mustapha* for Petitioner.

G. Jagadisa Ayyar for Respondent.

K.S. *Order quashed.*

Subba Rao and Panchapakesa Ayyar, JJ. Kaliappa Goundan *v.* Valliammal.
19th January, 1949. A. A. O. No. 403 of 1948.

Hindu Law—Guardianship—Girl aged two and a half years—Mother if can be preferred to father for appointment as guardian of person—Proper order to be made.

Though the father is the natural guardian of a Hindu child, if the mother is suitable and living, it is impossible to find an adequate substitute for her for the custody of a child of tender years (in this case a girl aged two and a half years) and it is in the interests of the child, whose interest should be the paramount consideration with Courts, that the mother should have the custody. I.L.R. 1941 Bom. 455, approved. I.L.R. 8 Cal. 969, dissented from.

The proper order to pass in such a case is to give the custody of the child to the mother till the child is 18 years and to enable the father to take the child to his house for three days in every quarter so that he may not lose the society and

affection of the child, in addition to allowing the father and the other relatives to visit the child in the mother's house at all convenient times.

S. T. Srinivasa Gopala Chari for Appellant.

K. V. Ramaseshan for Respondent.

K.S. *Order modified.*

Horwill and Rajagopalan, JJ. Paramban Mammadu, *In re.*
19th January, 1949. R. T. No. 83 of 1948.

Criminal trial—Evidence—Approver's evidence—When reliable by itself—Expert evidence as regards foot-prints—Notice of.

One generally expects the evidence of an approver to be rich in detail and colour, consistent with in itself and not having any important contradictions when compared with other statements made by him earlier. Such evidence carries conviction to the mind; so that a Court feels that very little other evidence is necessary to satisfy it beyond all reasonable doubt that the approver's story is true. (Value of expert evidence with regard to foot-prints discussed.)

K. S. Jayarama Ayyar with *B. Pocker* and *K. M. Seethi Sahib*, *P. A. Quadir Meeran*, *M. R. M. Abdul Karim* and *Maboob Ali Khan* for Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. *Appeals allowed.*

Balakrishna Ayyar, J. Ganapathy Thevar *v.* Sri Navaneetheswaraswami Devasthanam, Sikkil.
20th January, 1949. C. R. P. No. 1151 of 1948.

Civil Procedure Code (V of 1908), Order 6—Suit to recover leased property on the ground of non-payment of rent and denial of title—Leave to amend plaint by adding further ground of expiry of period of lease—If can be granted.

Courts have jurisdiction to take notice of subsequent events in a proper case when it will tend to shorten the litigation provided the defendant is not prejudiced.

(1929) M.W.N. 165, relied on.

Where a plaintiff who had filed a suit to recover possession of leased property on the ground of non-payment of rent and denial of title of the landlord and after the suit was filed the period of the lease expired the plaintiff can be given leave to amend the plaint by adding a further ground, namely, "expiry of the period of the lease." It cannot be said that such amendment would introduce a new cause of action.

A.I.R. 1934 Mad. 675 and 49 M.L.J. 479, referred to.

K. V. Ramachandra Ayyar for Appellant.

G. R. Jagadisan for Respondent.

K.S. *Petition dismissed.*

Satyanarayana Rao, J. Tulasamma *v.* Buchiramiah.
20th January, 1949. S. A. No. 678 of 1946.

Injunction—Person acquiring title to project eaves by possession for more than 12 years—Cannot be asked by injunction to remove the eaves or restrained from letting rain-water in neighbour's house property.

Where a person has acquired title to project his eaves into the neighbour's house by possession for more than twelve years, he cannot be restrained at the instance of the neighbour by an injunction from exercising that right.

Even though the right to allow rain-water to fall into the neighbour's land has been proved to have been exercised only for 16 years the Court has a discretion to refuse to grant a permanent injunction restraining the letting down of the rain-water.

I.L.R. 29 Mad. 511, followed ; A.I.R. 1936 Bom. 3, not followed.

[Duty of Subordinate Courts to follow decisions of its own High Court in preference to decisions of other High Courts stressed.]

K. Venkatarama Raju for Appellant.

V. Parthasarathi for Respondent.

K.S. *Appeal allowed. Leave refused.*

Panchapagesa Sastry, J. Ammalammal *v.* Gnanammal.

20*th January*, 1949. S. A. No. 448 of 1946.

Debtor and creditor—Payment to one of two payees after death of other—If discharge of debt—Payment—If saves limitation for suit by representatives of deceased payee—Limitation Act (IX of 1908), *section* 20—*Scope and applicability.*

Where one of the payees under a promissory note is dead payment to the other payee by the debtor will not operate in law as a discharge to the extent of the interest of the legal representative of the deceased payee. I.L.R. 36 Mad. 544, distinguished. It is not possible to regard the surviving promisee as an agent of the other joint promisee.

In a suit by the legal representative of the deceased payee for his share of the debt the impleading of the representatives of the joint payee as defendants after the expiry of limitation will not affect the sustainability of the suit as originally filed by the plaintiff. 51 M.L.J. 648, dissented from.

Quære.—Whether a sale by the maker of a promissory note to the surviving promisee in full discharge of the debt can operate as an admission of a subsisting liability to the other promisee or his heirs.

Conflict between (1948) 2 M.L.J. 454 and (1939) 1 M.L.J. 450, left open.

The fact that a part payment is made purporting to be in full discharge of the indebtedness does not stand in the way of section 20 of the Limitation Act being applicable.

Decision in 68 M.L.J. 73 should be taken to be no longer correct. I.L.R. 21 Lah. 470 : (1940) 1 M.L.J. 895 : L.R. 67 I.A. 160 (P.C.) (*Rama Shah* v. *Lal Chand*), relied on.

It is sufficient for the application of section 20 of the Limitation Act, if a part payment is made to one of the two payees and the benefit of such part payment as saving limitation can be availed of by the other payee or his representatives as the case may be.

T. E. Ramabhadrachariar and *M. S. Krishnaswami Aiyangar* for Appellant.

T. R. Srinivasan and *S. Gopalaratnam* for Respondents.

V. S. Rangaswami Aiyangar (Court Guardian) for 4th Respondent.

K.S. *Appeal dismissed. Leave granted.*

Satyanarayana Rao, J. Merchant *v.* The Bank of Mysore, Ltd.
21st January, 1949. A. A. O. No. 600 of 1948.

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *section* 9—*Petition for execution of order of eviction made under section* 7—*Objection that notice terminating tenancy was not given and so order was without jurisdiction—Not sustainable.*

If before the rent controller the tenant failed to raise the objection that the tenancy was not determined by proper notice under the Transfer of Property Act (assuming that that is the correct legal position) he is thereafter precluded from raising the objection in execution. The order was not on the face of it without jurisdiction and the tenant cannot resist execution by canvassing the correctness of the order passed by the controller on grounds not raised before him.

The rent controller has jurisdiction to order eviction even in cases where the tenancy was not determined as required by section 111 of the Transfer of Property Act as section 7 of the Rent Control Act deals with tenancies that were determined as well as those that had not been determined. There is no conflict between section 7 of the Rent Control Act and section 111 of the Transfer of Property Act.

Decision in O. S. A. No. 59 of 1948, relied on.

A. Nagarajan for Appellant.

N. Parthasarathi for Respondent.

K.S. *Appeal dismissed.*

Govinda Menon and Mack, JJ. Murugesan, *In re.*
21st January, 1949. Cr. M. P. No. 40 of 1949.

Madras Maintenance of Public Order Act (I of 1947), *section* 3 (5)—*Order that if detenu gives an undertaking that he will not take part in subversive activities he would be released—Legality—If one under section* 3 (5) *on modification of original order under section* 2 (1) *of the Act.*

Section 3 (5) of Madras Act I of 1947 gives the Provincial Government power to modify or confirm or cancel the previous order made under section 2 (1) of the same Act. A direction to the effect that a person who has been detained under section 2 (1) of the Act should not take part in subversive activities or give an undertaking that he will not take part in those activities is clearly one coming within sub-clause (5) of section 3 as being a " modification " of the original order. There is nothing illegal in making an order that if the person detained under section 2 (1) of the Act gives an undertaking that he will not take part in subversive activities of any kind either directly or through intermediaries, he would be released.

Petitioner not represented.

K.S. *Petition dismissed.*

Rajamannar, C.J. and Viswanatha Sastri, J.
21st January, 1949.

Venugopal Naidu *v.* The Third Judge, Court of Small Causes, Madras.
C. M. P. No. 5130 of 1948.

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *section* 12 (1) (a) *—Power of Government to constitute appellate authorities—Scope—Notification of* 1*st. March,* 1948, *substituting the " Court of Small Causes " for the " Chief Judge of the Court of Small Causes "—Validity—Power of Chief Judge of the Court of Small Causes to transfer appeal to another Judge of the Court.*

Government of India Act (1935), *section* 100 *and Schedule VII, List II, item* 2*—Delegation of power of legislation—Limits—Delegation of power of appointing authority involving extension of Courts' jurisdiction which can be done only by Legislature—Implied delegation of legislative power also.*

It cannot be said that the notification of 1st March, 1948, substituting the " Court of Small Causes," for the " Chief Judge of the Court of Small Causes " as the appellate authority under section 12 of the Madras Buildings (Lease and Rent Control) Act is invalid as enlarging the jurisdiction of the Small Cause Court otherwise than by appropriate legislation or as taking away existing rights of appeal. There is no doubt an extension of the jurisdiction of the Small Cause Court by that notification. But the Provincial Legislature is perfectly competent to make this extension of jurisdiction by virtue of the power conferred on it by section 100 of the Government of India Act read with item 2 of List II in Schedule VII to it. That this power of legislation could be delegated by the Legislature to the executive authority, that is the Provincial Government is also clear from the decision in *The King-Emperor* v. *Benoari Lal Sarma,* (1945) 1 M.L.J. 76 : L.R. 72 I.A. 57 : 8 F.L.J. 1 (P.C.). It cannot be said that under section 12 (1) (*a*) of Madras Act XV of 1946 what was delegated was only a power of appointment but not a power of legislation. Though that provision contemplates the appointment of an appellate authority, if it necessarily involves the exercise of legislative power because it may involve the extension of the jurisdiction of a Court, then impliedly the power of appointment must include such legislative power as is necessary for the purpose.

It cannot be said that all the Judges of the Small Causes Court must hear and decide appeals under the Act. Appeals under the notification under section 12 of Madras Act XV of 1946 would also be included in the business of the Court (under section 10 of the Presidency Small Cause Courts Act) and the Chief Judge may make such arrangements as he thinks fit for the distribution of the business of the Court among the Judges thereof. Accordingly where an appeal against the order of the Rent Controller is transferred by the Chief Judge of Small Cause Court to the Third Judge, the Third Judge has jurisdiction to dispose of the appeal.

Quære.—How far section 12 (4) of Madras Act XV of 1946 would affect the power of revision possessed by the High Court.

The Court of Small Causes, Madras, was constituted an appellate authority as a Court and it cannot be said that in the notification of the Government " the Court of Small Causes" meant "the three Judges of the Court of Small Causes." The right of appeal as it existed before the notification has not been taken away or interfered with by the notification in question. Only the Chief Judge of the Court of Small Causes ceased to exist as an appellate authority.

K. S. Ramamurthi for Petitioner.

The Advocate-General (*K. Rajah Aiyar*) for Government.

K.S. *Application dismissed.*

Rajamannar, C.J. and Raghava Rao, J.
25*th January*, 1949.

Rangaswami Naidu *v.* The Second Judge, Court of Small Causes, Madras.
C. M. P. No. 6144 of 1948.

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *section* 12 (3)—*Appellate authority—Powers of—If can remand a case to the controller after disposing of the appeal.*

The appellate authority under Madras Act (XV of 1946) has got the power to make such further enquiry as it thinks fit before deciding the appeal. This enquiry it can do, either personally or through the controller. But after such enquiry the appellate authority is bound to decide the appeal. It is not enough if the appellate authority merely disposes of the appeal ; it is bound to decide the appeal. If in its opinion the material on record is not sufficient, it can make further enquiry personally or through the controller ; but eventually the appellate authority shall decide the appeal. The appellate authority under the special Act has not got all the inherent powers which may be possessed by the ordinary appellate Courts of the land. Accordingly the appellate tribunal has no power to remand a case for fresh disposal and an order so remanding must be quashed.

Raman and *Raghavan* for Petitioner.

K. Bhashyam and *R. Desikan* for second Respondent.

K.S. *Order quashed.*

Rajamannar, C.J. and Raghava Rao, J.
25*th January*, 1949.

Ramanathan Chettiar *v.* Seth Kotoomal Thanardas.
O. S. A. No. 66 of 1948.

Practice—Petition for adjudication alleging act of insolvency—Counter-affidavit not admitting acts of insolvency alleged in affidavit—Final order of adjudication without taking evidence adduced by both parties—Propriety.

Where the allegations of acts of insolvency made in the affidavit were not admitted in the counter-affidavit it cannot be said that the counter-affidavit contains no reply to the acts of insolvency alleged. In such a case a final order of adjudication ought not to be made without taking the evidence adduced by both the parties.

A. Swaminatha Aiyar for Appellant.

E. R. Krishnan and *Official Assignee of Madras* for Respondents.

K.S. *Appeal allowed and application remanded.*

Subba Rao and Panchapakesa Ayyar, JJ. Paramananda Swami *v.* Shanmugham Pillai.
19th January, 1949. A. A. O. No. 508 of 1948.
(C. R. P. No. 513 of 1948 converted into A. A. O.)

Civil Procedure Code (V of 1908), *section* 51—*Suit by sons of judgment-debtor for setting aside dismissal of their claim petition—Consent order that property should not be sold till disposal of suit—Grant of time to judgment-debtor for payment —Failure to pay—Arrest —Propriety.*

Where there was a consent order that the property should not be sold till the disposal of a suit by the sons of the judgment-debtor for setting aside the order dismissing their claim petitions and it was not shown that the judgment-debtor had other property an order for arrest for failure to pay the decree-debt within the time granted for that purpose cannot be passed. In the circumstances, it cannot be said that the judgment-debtor was shown to have the means to pay the amount of the decree and refused or neglected to pay the same.

It is impossible to say that when time was taken for payment of the amount the judgment-debtor either expressly or impliedly admitted that he was liable to be arrested in case the amount was not paid. Accordingly the judgment-debtor is not estopped from raising the plea that he has not sufficient means to pay the amount of the decree in showing why he should not be arrested.

N. C. Raghavachari for Appellant.

S. Ramachandra Aiyar for Respondent.

K.S. —— *Appeal allowed.*

Panchapagesa Sastri, J. Thirumalai Iyengar *v.* Arunachala Thevar.
19th January, 1949. S. A. No. 1453 of 1946.

Civil Procedure Code (V of 1908), *section* 64 *and Order* 21, *rule* 57, *proviso—Applicability of proviso to r.* 57 *of O.* 21—*Order "struck off" on execution petition—If one of dismissal for default—Effect on attachment before judgment.*

An order on an execution petition was as follows :—"Defendant's notice returned unserved for want of proper address and residence. The petition may be renewed with correct address. Struck off. The attachment will subsist." Subsequently another execution petition filed for the sale of the attached property was ordered and the decree-holder purchased the property in 1942 and the sale was confirmed. Meanwhile in 1935 the same property had been purchased under a private sale by *X*. On a question as to the competing title of the purchasers it was contended that on the dismissal of the first execution petition the attachment before judgment had come to an end and that *X* got a good title to the property.

Held, by the words "struck off" the executing Court did not mean to dismiss the petition for default of the decree-holder, but was merely adjourning it in truth though closing it for statistical purposes. The order cannot be read as dismissal for default within the meaning of Order 21, rule 57 of the Civil Procedure Code. Accordingly as the attachment before judgment had not ceased to exist the decree-holder's purchase must prevail over the private sale in favour of *X.*

R. Gopalaswami Aiyangar for Appellant.

K. S. Desikan for 1st Respondent.

K.S. —— *Appeal allowed. Leave refused.*

Balakrishna Aiyar, J. Govindaraja Mudaliar *v.* Saravana Mudaliar.
20th January, 1949. C. R. P. No. 1414 of 1947.

Civil Procedure Code (V of 1908), *Order* 6, *rule* 17—*Amendment of plaint—Application made after demand of deficit court-fee—If can be granted.*

The circumstance that the amendment of the plaint was sought (for substituting a prayer for a declaration of lease-hold interest in the place of an absolute right) only after the demand for deficit court-fee had been made cannot stand in the way of the amendment being allowed if it would be otherwise proper. Under Order 6, rule 17 of the Civil Procedure Code, the Court has sufficient power in

appropriate cases to permit amendment of pleading and this power can naturally be exercised till the plaint is actually rejected.

M. Chelva Aiyangar for Petitioner.

P. Rajeswaran for Respondent.

K.S. *Petition allowed and case remanded.*

Satyanarayana Rao, J. Ramayya *v.* The District Board, Coimbatore.
21st January, 1949. S. A. No. 897 of 1947.

Madras Local Boards Act (XIV of 1920)*—Rules under—Rule* 5*—Requirements—Punishment of officers and servants—Notice of proposed action if to be given along with the charge.*

Unlike under section 240 (3) of the Government of India Act (1935) all that is required to be done under rule 5 of the Rules framed under sections 70, 72 and 199 of the Madras Local Boards Act is to inform in writing the grounds on which it is proposed to take action and such grounds should be reduced to writing and communicated to the person concerned. The rule does not require that the proposed action should be intimated. What is required to be communicated is that it is proposed to take action and not the nature of the punishment.

A charge against the Headmaster of a District Board School, cannot be said to be defective because the punishment of dismissal which was ultimately awarded to the plaintiff was not mentioned in the charge and communicated to him even at the outset.

The punishment under the rules is left to the discretion of the President of the District Board and is not open to consideration by the High Court in second appeal.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Appellant.

T. V. Ramanatha Aiyar and *W. S. Krishnaswami Naidu* for Respondent.

K.S. *Appeal dismissed. Leave refused.*

Rajamannar, C.J. and Viswanatha Sastri, J. K. Govindan Nair *v.* Appukutty.
21st January, 1949. C. R. P. No. 1090 of 1947.

Madras Tenants and Ryots Protection Act (XVII of 1946)*, section* 4 (1)*—Othidar or usufructuary mortgagee who has in his turn parted with actual possession of the land to others—If " tenant " (under Malabar Tenancy Act) entitled under Madras Act (XVII of* 1946) *to have stay of proceedings for eviction—Malabar Tenancy Act (XIV of* 1930)*, section* 3 (v) *(j)—" Tenant "—Meaning.*

An othidar or a usufructuary mortgagee who has in his turn parted with actual possession of the land to others would be a tenant entitled to the benefit of the provisions of Madras Act XVII of 1946.

There is no justification for holding that an " intermediary " included in the definition of a " tenant " in clause (*v*) of section 3 of the Malabar Tenancy Act must, in addition to being a person falling within the definition of an intermediary in clause (*j*) also be a person who has paid or has agreed to pay rent or other consideration for his being allowed by another to enjoy the land of the latter.

(1948) 2 M.L.J. 381, overruled ; I.L.R. 1943 Mad. 674 : (1942) 2 M.L.J. 739, referred to and relied on.

S. Venkatachala Sastri for Petitioner.

S. V. Venkatasubramaniam for Respondent.

K.S. *Petition allowed.*

Viswanatha Sastri, J. Appavu Naicker *v.* Karia Koundan.
21st January, 1949. A. A. O. No. 385 of 1948.

Limitation Act (IX of 1908)*, Article* 182*—Agreement registered under section* 14 (2) *of Madras Act XI of* 1936*—Taking effect as a decree—Whether governed by the* 3 *years or* 6 *years rule of limitation.*

The language of section 14 of Madras Debt Conciliation Act (XI of 1936) is not unequivocal, and one is not constrained to interpret that section read with

the second column of Article 182 of the Limitation Act in such a way as to hold that the period of limitation for execution is only three years for an agreement which has been registered under section 14 of Madras Act XI of 1936.

It is the agreement that has the force of a decree, and regard must be had only to its terms in order to give the appropriate relief by way of execution. Registration is no doubt essential to make the agreement effective as a decree and therefore capable of execution, but the terms of the decree alone have to be treated as the decree enforceable by way of execution. It cannot be said that where a certified copy of the decree is not registered the six years rule of limitation will not apply.

R. Rangachari for Appellant.

L. S. Veeraraghava Aiyar for Respondent.

K.S. ——— *Appeal dismissed. Leave granted.*

Satyanarayana Rao and Govinda Menon, JJ. Kalla Surayya & Sons. *v.* Province of Madras.
24th January, 1949. C. R. P. No. 1394 of 1947.

Court-Fees Act (*VII of* 1870), *section* 7 (iv-A)—*Applicability—Order of Deputy Commercial Tax Officer levying tax—Not a " decree "—Suit for declaration that order was illegal—Court-fee.*

An order of the Deputy Commercial Tax Officer levying tax is not a " decree " within the meaning of section 7 (*iv-A*) of the Court-Fees Act and for a suit for declaration that such order was illegal section 7 (*iv-A*) does not apply and *ad valorem* court-fee on the amount of tax need not be paid.

Section 7 (*iv*) (*c*) of the Court-Fees Act applies and the plaintiff is entitled to value the relief under that section put his own valuation, and pay court-fee on the value so fixed by him. That value will also be the value for purposes of jurisdiction under section 8 of the Suits Valuation Act.

It is not necessary to value separately the consequential reliefs for injunction to restrain the defendants from assessing sales tax in future on its business.

M. S. Ramachandra Rao and *M. Krishna Rao* for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

K.S. ——— *Petition allowed.*

Rajagopalan, J. Ramaswami Ayyar *v.* The Srirangam Municipal Council.
24th January, 1949. S. A. No. 978 of 1946.

Madras District Municipalities Act (*V of* 1920), *section* 81 (4)—*Lands within municipal limits used exclusively for purposes of agriculture—Levy of tax under section* 81 (2)—*If prevented by section* 81 (4).

There is nothing in section 81 (4) of the District Municipalities Act to prevent a municipality from levying taxes on agricultural land under section 81 (2), though the municipality could very well have levied that tax on the annual value calculated on the basis of section 81 (4). It is for the assessing authority, to decide, not for the assessee to tell the assessing authority, which of the two modes of assessment permitted by the statute, the assessing authority should elect.

Section 81 (4) provides merely an alternative method of levy. Decision of Byers, J., in S. A. Nos. 1025 and 1026 of 1943 and *obiter* in (1944) 2 M.L.J. 25 (P.C.), relied on.

K. G. Srinivasa Aiyar for Appellant.

K. R. Krishnaswami Aiyar and *S. P. Subramaniam* for Respondent.

K.S. ——— *Appeal dismissed. Leave refused.*

Viswanatha Sastri, J. Kodalan *v.* Chinna Sennammal.
24th January, 1949. A. A. O. No. 85 of 1947.

Limitation Act (*IX of* 1908), *Article* 182 (5)—*Order striking off execution petition for want of bidders at the execution sale—Not an order finally dismissing the petition—Fresh execution petition can be treated as continuation of prior petition.*

An order striking off an execution petition for want of bidders at the execution sale is not an order finally dismissing the execution petition. The fact that the decree-holder filed a fresh execution petition does not necessarily mean that the prior execution petition was finally put an end to. In the circumstances, the execution petition could be treated as a continuation of the prior execution petition.

K. E. Rajagopalachari and *P. B. Ananthachari* for Appellant.

S. Krishnamurthi and *Vepa P. Sarathy* for Respondent.

K.S. ——— *Appeal dismissed.*

Rajagopalan, J. Thathi Naicker *v.* The Co-operative Society, Kundalakuthur.
24th January, 1949. S. A. No. 2119 of 1946.

Civil Procedure Code (V of 1908), *section* 64—*Sale under an award at the instance of a co-operative society—Not a "private transfer"—Madras Co-operative Societies Act (VI of* 1932)—*Rules under-rule* 22 (20) (a)—*Sale in contravention of—If nullity.*

A sale under an award at the instance of a Co-operative Society is not a "private transfer" within the meaning of section 64, Civil Procedure Code and will accordingly prevail against an attaching decree-holder.

The absence of an enabling provision like section 63 (2), Civil Procedure Code, from rule 22 (20) (*a*) of the rules framed under the Madras Co-operative Societies Act does not necessarily imply that a sale in contravention of rule 22 (20) (*a*) is a nullity.

T. K. Rajagopalan for Appellant.

K. Veeraswami for Respondents.

K.S. ——— *Appeal dismissed.*

Viswanatha Sastri, J. Lakshmiamma *v.* Koyakutti.
25th January, 1949. S. A. No. 2305 of 1946.

Limitation Act (IX of 1908), *Article* 110—*Starting point of limitation for suit for recovery of arrears of rent.*

The last day on which a suit for the recovery of arrears of rent can be instituted is the last day of the third year from the close of the year in which the rent became payable. Where rent was payable in the month of *makaram* 1116 (Malayalam) the tenant was bound to pay it before the close of the last day of that month and the landlord must bring his suit for recovery of such rent within three years from that day. It is erroneous to say that an arrear of rent does not become payable until the day after that on which by the terms of the contract the rent is payable. The rent becomes due at the last moment of time allowed to the tenant for payment. If it is not paid within that time it *eo instanti* becomes an arrear and continues an arrear until it is paid.

I.L.R. 6 Cal. 325 (F.B.), relied on.

The last day of *makaram* 1116 expired on 11th February, 1941 and a suit for arrears of rent of that year filed on 12th February, 1944, is barred by limitation.

K. P. Ramakrishna Aiyar for Appellant.

B. Pocker for Respondent.

K.S. ——— *Appeal dismissed. Leave granted.*

Mack, J. Rangaswami Iyer *v.* Madura Urban Co-operative Bank, Ltd.
26th January, 1949. C. R. P. No. 1132 of 1947.

Execution—Decree for costs against trustee suing on behalf of trust—Executable personally against trustee.

Where a decree does not say on the face of it that the costs should be paid out of the estate or institution the trustee is personally liable.

It is regrettable that in cases where a trustee sues or is sued, there should be any ambiguity in the decree which should make it perfectly clear whether the trustee is liable personally or whether the costs should be paid out of the estate.

67 M.L.J. 209 : I.L.R. 58 Mad. 160 and 67 M.L.J. 787, relied on.

M. S. Venkatarama Aiyar for Petitioner.

P. V. Subramaniam for Respondent.

K.S. ——— *Petition dismissed.*

Raghava Rao, J.
27th January, 1949.

Satyam *v.* Venkataswami.
S. A. No. 627 of 1946.

Practice—Issue whether a sale deed was nominally executed in fraud of creditors—Onus—Affidavit evidence—Admissibility—Relevancy of evidence—If can be questioned for first time in second appeal.

Where the issue was whether a sale deed was nominally executed in fraud of creditors, the question of burden of proof ceases to be a matter of any particular importance after adduction of evidence of both sides. I.L.R. 44 Cal. 662 : 32 M.L.J. 425 (P.C.) and 63 M.L.J. 694 (P.C.), relied on. Not merely can the Court base its conclusion on the effect of the evidence taken as a whole but it may also draw adverse inference against a party who being in a position to adduce "better" evidence deliberately abstains from doing so. I.L.R. 1937 Mad. 299 (311), followed.

Ordinarily the evidence of any person must be given orally in open Court in the presence and under the personal direction and superintendence of the Judge under Order 18, rule 4, Civil Procedure Code, except in cases of examination by interrogatories under Order 11, Civil Procedure Code or on commission under Order 26, Civil Procedure Code. Affidavit evidence is not permitted except (*a*) where there is an agreement between parties that evidence may be taken by affidavit (16 Ch.D. 100 and A.I.R. 1939 Mad. 927) or (*b*) where under Order 19, rule 1, Civil Procedure Code, there is an order of Court that particular facts may be proved by an affidavit or that the affidavit of any witness may be read at the hearing. Any affidavit of any person cannot go in as evidence *proprio vigore* without necessity for him to enter the witness-box. The contents of an affidavit may be admissible if it can be regarded as a statement in writing complying with the conditions prescribed by section 32 of the Evidence Act.

It may be that an objection as to admissibility is susceptible of waiver but not so an objection as to relevancy. Where an affidavit went in without demur at the trial, the question of the relevancy of its contents according to the requirements of section 32 of the Evidence Act, would still be a matter open to consideration in second appeal.

Bhimasankaran for Appellant.
P. Somasundaram and *P. Suryanarayana* for Respondents.

K.S. — *Appeal dismissed. Leave refused.*

Rajagopalan, J.
31st January, 1949.

Seetan Naidu *v.* Appalaswami.
S. A. No. 1054 of 1947.

Mortgage—Provision that it should be for a period of 26 years—Clause that if before the expiry of the period mortgagors paid before cultivation season of any year the amount of principal the land and document should be put back in the possession of the mortgagors immediately—Assignee from mortgagors—If can redeem before expiry of the term.

A mortgage deed provided that the period of mortgage should be 26 years. But this was qualified by a subsequent clause "if perchance opportunity occurs to us and if money is procured and if we should pay before the cultivation season of any year the amount of principal after cancelling the *dwigunam* towards balance of the debt due under the said kandagutta, this land and this document should be put in our possession immediately."

In a suit by the assignees from the mortgagors for redemption before the expiry of the 26 years period of the mortgage.

Held, the plaintiffs as the successors in interest of the original mortgagors had the right to redeem even prior to the contract period of 26 years.

There is no real statutory bar as such to the assignees of the mortgagors claiming the right to redeem before the expiry of the 26 years period. Nor do the terms of the contract bar such a relief being claimed by the assignees of the mortgagors.

A.I.R. 1928 All. 131, distinguished.

S. Ramamurti for Appellant.

C. V. Dikshitulu for Respondent.

K.S. *Decree set aside and appeal remanded. Leave granted.*

Mack, J. Rajam Aiyar *v.* Pavanambal.
1st February, 1949. C. R. P. No. 1397 of 1948.

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *section* 12 (4)—*Subordinate Judge appointed as appellate authority for purposes of Act—Is* persona designata *and not a Court subject to the revisional jurisdiction of the High Court.*

The Subordinate Judge notified as the appellate authority under Madras Act XV of 1946 is *persona designata* and not a Court subordinate to the High Court, a condition necessary for the revisional powers under section 115 of the Code of Civil Procedure to be invoked.

(1947) 1 M.L.J. 207 and (1948) 1 M.L.J. 314, referred to. (1949) 1 M.L.J. 74, considered and distinguished.

N. Arunachalam for Petitioner.

T. E. Ramabhadrachariar for Respondent.

K.S. *Petition dismissed.*

Mack, J. Kuppuswami *v.* Nagappa.
2nd February, 1949. C. R. P. No. 104 of 1948.

Execution—Orders on defective petition—Subsequent application for execution—Question whether earlier petition was in accordance with law—If can be reopened for deciding question of limitation.

The mere fact that the executing Court does not notice some radical defect in an execution petition and issues an order to execute either by way of arrest or attachment will not make the execution petition legally maintainable or an effective step-in-aid of execution, and it would still be open to the judgment-debtor to appear at a later stage and satisfy the Court that the earlier execution petition (which was not personally served on him and then conveniently withdrawn) was radically defective (as not signed by the decree-holder) and in law not an execution petition at all. On the other hand it would not be open to a judgment-debtor to come before the Court and plead a mere technical defect in the filing of the execution petition and seek thereby to evade limitation.

1937 M.W.N. 355 and 57 L.W. 356, considered.

D. Ramaswami Aiyangar for Petitioner.

G. Natarajan for Respondent.

K.S. *Petition dismissed.*

Horwill and Balakrishna Ayyar, JJ. Gopala Marar *v.* The Third Judge of the
9th February, 1949. Court of Small Causes, Madras.
C. M. P. No. 6146 of 1948.

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *section* 12 (4)—*If takes away jurisdiction of High Court to interfere by writ of* certiorari.

Unless the provision of law relied on expressly negatives the power of the High Court to interfere by a writ of *certiorari*, it should not be implied that the power of the Court has been taken away.

Halsbury's Laws of England, Volume IX, paragraphs 1455 and 1456, referred.

Even if no notice to quit was given, the landlord would nevertheless be entitled to evict a tenant on default in payment of rent.

Decision in O. S. A. No. 59 of 1948, relied on.

M. Chinnappan Nayar for Petitioner.

K. P. Mahadeva Aiyar for Respondent.

K.S. *Petition dismissed.*

Satyanarayana Rao, J.
19th January, 1949.

West Coast Electric Supply Corporation, Ltd. *v.* Dinkar Rao.
C. C. C. A. No. 55 of 1947.

Companies Act (VII of 1913), *section* 126—*Debentures—Redemption before expiry of period fixed —Not permissible.*

Ordinarily, if *A* agrees with *B* for a consideration of a loan of Rs. 100 from *B* to *A*, that he (*A*) will repay the loan five years hence, then *B* is not entitled to sue for the debt until the expiration of that period, nor can *A* claim to pay off the debt until the expiration of that period unless *B* chooses to take it before that time. Even in the case of mortgages the term fixed for redemption is not necessarily a clog on the equity of redemption, unless the length of the period is unreasonable or oppressive or unconscionable.

Under the Companies Act, section 126, in the case of debentures the period fixed is never treated as a clog on the equity of redemption even if it is contained in a mortgage.

Where the covenant is that " the company will, on the 1st day of January, 1955, pay to the debenture-holders " the company cannot redeem before that date. The clause in the trust deed for payment before 1st January, 1955, cannot be binding on the debenture-holders who were not parties to that deed. The company will be committing breach of contract in redeeming before the date and will be liable for damages.

K. V. Ramachandra Aiyar and *S. Thiagaraja Aiyar* for Appellant.

Messrs. John and Row and *G. Gopalakrishnan* for Respondents.

K. S. ——— *Decree modified and Appeal dismissed.*

Mack, J.
1st February, 1949.

Pothuraju *v.* Satyanarayana.
C. R. P. No. 1656 of 1948.

Partnership—Suit for dissolution by partner having a small share—Power to sell going concern—Exercise of—Principles to be borne in mind.

No doubt, the Court in a suit for dissolution of partnership has power to sell even a going concern. But when one partner has a greatly preponderating interest in the concern his interests should be considered and any proposals submitted by him for the purchase of the shares of partners with small interests must be given serious consideration.

1876 A.C. 174, relied on.

It is not desirable to order a sale of an entire rice mill in a suit for dissolution by a partner who has a right to a 1/5th share while the other partner holds a preponderant interest in the mill amounting to a 4/5th share.

S. Ramamurthi for Petitioner.

P. Suryanarayana for Respondent.

K.S. ——— *Petition allowed. Decree modified.*

Subba Rao and Panchapakesa Ayyar, JJ.
1st February, 1949.

Sriramulu *v.* Peda Rama Jogi.
S. A. No. 1569 of 1941.

Partnership Act (IX of 1932), *section* 69—*Scope—Suit for rendition of accounts of a dissolved partnership which was not registered before dissolution—Maintainability.*

The ban to file a suit under section 69 by a partner for the reliefs against the persons mentioned therein during the continuance of the partnership is lifted by the proviso when the partnership is dissolved. If the disability imposed by section 69 ceased after the dissolution, it follows that a partner could enforce all his rights to which he was entitled under the provisions of the Partnership Act and under the terms of the contract between the parties. Accordingly a partner would be entitled to file a suit for rendition of accounts after the dissolution of the partnership even though the partnership was not registered before its dissolution.

The words "suit for accounts" are words of well known connotation and they are always understood to include "suit for rendition of accounts."

(1947) 2 M.L.J. 241 and I.L.R. 1940 All. 26, relied on.

K. Bhimasankaram for Appellant.

D. Narasaraju and *K. B. Krishnamurthi* for Respondents.

K.S. ——— *Appeal dismissed.*

Rajamannar, C.J. and Viswanatha Sastri, J. Thangiah *v.* Veerappa Mudaliar.
2nd February, 1949. Appeal No. 387 of 1945.

Hindu Law—Illegitimate sons of Sudra—If coparcener of his father—Nature of rights—Will by father—Validity—Burden of proof—Appellate Court—Powers of in respect of finding of fact.

The illegitimate sons of a Sudra have no interest in the ancestral properties of their father as coparceners. They could not have interdicted an alienation made by the father during his lifetime. On his death intestate and without legitimate sons, his properties would have devolved on his illegitimate sons as heirs along with the widow, daughter or daughter's son. Though the illegitimate son of a Sudra has the status of a son and is a member of the family he does not acquire by birth an equal interest with his father in the ancestral property. Unlike a legitimate son, he cannot demand or enforce a partition against his father during his life time. It is only by the "father's choice" or pleasure that he may be allotted a share if a partition takes place between a father and his legitimate sons.

Accordingly the illegitimate sons cannot contend that a will by their father was inoperative by reason of any legal incapacity of the testator under Hindu Law to dispose of the properties by will.

Burden of proof as to a will and the scope of powers of appellate Court in dealing with findings of the trial Court based on oral evidence discussed.

K. R. Venkatarama Ayyar, K. S. Sankara Ayyar and *V. Sundaresan* for Appellants.

A. V. Narayanaswami Aiyar and *S. Krishnamachari* for Respondents.

K.S. ——— *Appeal dismissed.*

Subba Rao and Panchapakesa Ayyar, JJ. Nagamma *v.* Aghorapathi Sastri.
3rd February, 1949. Appeal No. 357 of 1947.

Vendor and purchaser—Sons of Hindu vendor challenging alienation and obtaining decree for possession and actual possession in execution—Suit by purchaser for damages for dispossession against sons of vendor—Limitation—Date of "dispossession"—If that of decree or actual physical dispossession.

Where the sons of a Hindu vendor obtain a decree setting aside some alienations made by their father directing the sons to pay a moiety of the binding portion of the consideration and they ultimately deposited the amount and obtained possession the limitation for a suit by the purchaser for damages for breach of covenant for title and possession (against the sons of the deceased vendor on the pious obligation theory) will be six years from the date of actual physical dispossession and not from the date of the vendor's sons depositing the amount required of them and being thereby entitled to recover possession. The general rule of law is that dispossession should mean physical dispossession and not merely a right to dispossess. Though the right to remain in possession may have been lost by a decree against the purchaser his "wrongful possession", is irrelevant for purposes of limitation. The fact that mesne profits were ordered to be paid by the purchaser after the date of deposit by the sons will make no difference.

I.L.R. 1944 All. 612, relied on; 17 I.C. 238, explained and distinguished.

V. Rangachari and *K. V. S. Ranganadhachari* for Appellant.

P. Somasundaram and *P. Suryanarayana* for Respondents.

K.S. ——— *Appeal allowed and suit remanded.*

Raghava Rao, J. Chenchurama Reddi *v.* Ademma.
4th February, 1949. S. A. No. 675 of 1946.

Limitation Act (IX of 1908), *Article* 142—*Applicability—Adverse possession for twelve years by several persons in succession not claiming from one another—Bars true owner.*

Adverse enjoyment of immovable property for over twelve years, whether by a single person or by several persons in succession, even though they do not claim from one another, provided it is continuous and without a break bars the true owner under Article 142 of the Limitation Act.

(Case-law discussed).

Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for Appellant.

K. Umamaheswaram for Respondent.

K.S. ——— *Appeal allowed. No leave.*

Panchapakesa Ayyar, J. Mangamma *v.* Venkata Mallikarjuna Varaprasada Rao.
4th February, 1949. C. R. P. No. 1495 of 1947.

Madras Hindu Religious Endowments Act (II of 1927), *section* 78—*Petition filed with certificate by the Board but not in the prescribed form—Production of certificate before passing orders—Sufficiency.*

The production of a certificate in the form prescribed is no doubt mandatory and no petition for delivery of property under section 78 of the Madras Hindu Religious Endowments Act could be ordered without the production of such a certificate. Decision in C. R. P. No. 1341 of 1946 [(1949) 1 M.L.J. 200] relied on.

But the usual rule in allowing succession certificates to be produced (where such certificate is required) before the matter is proceeded with, may be followed in petitions unders section 78 of the Religious Endowments Act also, the important thing being that no order for delivery should be made without such certificate being produced.

B. S. Ramachandra Rao for Petitioner.

G. Venkatarama Sastri for Respondent.

K.S. ——— *Order set aside and Case remanded.*

Govinda Menon and Mack, JJ. The Province of Madras *v.* Firm of Kanlagolla Sivalakshminarayana.
4th February, 1949. Appeal No. 514 of 1947.

Madras General Sales Tax Act (IX of 1939), *section* 8—*Scope—Agent buying or selling for principal for a commission—Exemption from tax—Conditions essential for.*

A clandestine profit made by a commission agent other than the agreed commission will disentitle him to the benefits of section 8 of the Madras Sales Tax Act. If an agent acting on behalf of a buying principal for an agreed commission, purchases goods in the open market at a particular price and sells the same to his buying principal at a higher price and at the same time collects a commission also, then he cannot claim the advantage of section 8 unless the buying principal knows that his agent had, in the open market, paid a lower sum for the same goods and either explicitly or by action or deed from which consent can be implied, acquiesced in it. The real import of section 8 is that the agent should act only as a medium for the transfer of goods from one party to another and for acting as such a medium, intermediary or agent, he should be paid a remuneration or commission. Such transactions might sometimes result in the medium, intermediary, or agent, acting as vendor or purchaser himself, as understood in law. But even then he is only an agent and he should strictly conform to the mandatory provisions of section 8 in order to get exemption.

In cases where such agents acting as agents for selling goods, without paying *rusum* to the dealers from whom they got the goods, collected such *rusum* from their purchasers (their principals) the exemption under section 8 cannot be invoked.

Merely because an agent collects as *rusum* from his principal the sales tax he might have to pay to the sellers it cannot be said that he is charging more than his commission and that he will be exposed to sales tax.

Per Mack, J.—The section exempts from sales tax a commission agent who buys for a known principal specified in his accounts for an agreed commission or

brokerage. The section does not require that the seller be disclosed to the buyer before the purchase is effected. It is sufficient compliance with section 8 if the buyer principal and the seller to the commission agent are specified in the latter's accounts.

Advocate-General (*K. Rajah Ayyar*) and The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

B. V. Subramaniam for Respondent.

K.S.

Appeal and memorandum of cross objections dismissed.

Raghava Rao, J.
11*th February*, 1949.

Subba Reddi *v.* Koti Reddi.
C. R. P. Nos. 1392 & 1393 of 1946.

Civil Procedure Code (*V of* 1908), *Order* 41 *rule* 33—*Relief under can be granted only in a pending appeal and not after appeal has been disposed of—Party who has pursued his remedies and failed—Cannot apply under rule* 33 *of Order* 41.

The relief which can be granted under Order 41, rule 33, Civil Procedure Code can only be granted in a pending appeal and not in an appeal already disposed of. Though the discretion vested in the Court under this provision is very wide, it is invokable only in a pending appeal. Further where a party had already pursued his remedy but failed he could not apply under Order 41, rule 33.

K. Krishnamurthi for Petitioner.

V. V. Sastri (*amicus curiae*) for Respondents.

K.S.

Petitions dismissed.

Satyanarayana Rao and Rajagopalan, JJ.
14*th February*, 1949.

Sreenivasan, *In re.*
Cr.M.P. No. 43 of 1949.

Madras Maintenance of Public Order Act (*I of* 1947), *section* 2 (1)—*Order of detention—Grounds of satisfaction—Object with which detention was ordered—If can be looked at in considering* bona fides *of exercise of power—Order made with object of preventing a person who was in judicial custody coming out on bail*—Mala fides—*Illegality of detention.*

An affidavit filed on behalf of the counter-petitioners in an application for the issue of a writ of *habeas corpus* in respect of a detenu under Madras Act I of 1947 averred as follows :—" While in remand he the petitioner then under judicial custody applied for bail and the Sessions Judge, Coimbatore, ordered his bail on condition that he should report at the police station every day. As such the detenu was at liberty to furnish the necessary securities and come out from the jail. Hence an order for his detention was considered necessary. He was treated as a detenu from 21st March, 1948."

Held : That it was to prevent the release of the petitioner on bail that his detention was considered necessary. That clearly is not one of the grounds of satisfaction section 2 (1) of Madras Act I of 1947 contemplates.

In considering the question whether the apparent satisfaction recorded by the District Magistrate was in good faith in exercise of the statutory powers conferred upon him, it is certainly permissible to view the order of detention in relation to the apparent and avowed object with which that order of detention was passed, *i.e.*, not to prevent a breach of the peace or a danger to public safety but to prevent the petitioner from coming out of jail if he could find the sureties he was required to do by the Sessions Judge.

Such an exercise of power was *mala fides* and where a detention is traceable to such an exercise of power *mala fides*, the detention must be held to be illegal.

It cannot be said that the petitioner who was in judicial custody at the time was " acting " in a manner prejudicial to public safety, and where the order uses the word " acting " the Court will not import into that order that the District Magistrate meant to say that the petitioner was " about to act " in a manner prejudicial to public safety.

N. S. Mani for *Messrs. Row and Reddy* for Petitioner.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

K.S.

Petition allowed.

Subba Rao and *Panchapakesa Ayyar, JJ.* 20*th January*, 1949.

Parandamayya *v.* Navaratna Sikamani. A. A. O. No. 209 of 1947.

Hindu Law—Custom among kammas of Andhra Desa—Custom that in case of estrangement between husband and wife all presents made to bridegroom at the time of marriage should be returned to wife—Valid and not opposed to public policy—Award based on such custom—Legality—Arbitration Act (*X of* 1940), *section* 30.

A custom among Kamma families of Andhra Desa that "if estrangement results between the wife and the husband, dowry and all other kinds of gifts and presents that were made to the bridegroom by the bride's people have to be handed back to the bride after rendering a complete account with interest by the bridgeroom or his family" is valid and not opposed to public policy. It cannot be said that the custom was opposed to public policy inasmuch as it would encourage a wife to get away from her husband with the hope of getting money that was presented at the time of the marriage. The custom is really to safeguard the interests of a woman who, for one reason or other, has to live apart from her husband. It was conceived in the best interests of women, a section of the public who would otherwise be put to grave hardships and untold miseries.

An award passed on the basis of such a custom cannot be attacked as illegal within the meaning of section 30 of the Arbitration Act.

C. V. Narasimha Rao for Appellant.

V. T. Rangaswami Aiyangar and *K. Ramaseshayya* for Respondents.

K.S. ——— *Appeal dismissed.*

Viswanatha Sastri, J. 26*th January*, 1949.

Bapanayya *v.* Bangarraju. S. A. No. 1925 of 1946.

Registration Act (*XVI of* 1908), *section* 77—*Suit under—Powers of Court.*

In a suit under section 77 of the Registration Act (for directing the sub-registrar to register a deed) the Civil Court has got to do only what the registering officer should and could have done under the powers conferred on him by the Registration Act. The Court should be guided by the same considerations which guide the Registrar in registering or refusing to register a document presented to him. Under section 35 of the Registration Act, a Registrar is bound to register a document if the ostensible executant admits his signature to the document. If the person admitting his signature or thumb impression proves that he signed it under a misapprehension believing it to be a different kind of document as a result of a deception practised upon him and he was therefore unaware of the real nature of the document, it is a ground for setting aside the document or having it adjudged void and inoperative in an ordinary suit in a Civil Court. But neither the Registrar nor the Court in a suit under section 77 of the Registration Act has jurisdiction to enter into these questions. In a suit under section 77, the Court is concerned with two questions (*a*) whether the document has been executed and (*b*) whether the requirements of the law for registering documents have been complied with. The Court cannot in such a suit go into such defences as whether the document was obtained by fraud or misrepresentation or even a defence that the mind of the executant did not accompany his signature. 66 M.L.J. 424 referred.

V. Parthasarathy for Appellant.

S. Venugopala Rao for Respondent.

K.S. ——— *Appeal allowed.*

Rajamannar, C.J. and *Raghava Rao, J.* 1st *February*, 1949.

Ahmed Ali & Co. *v.* Commissioner, Corporation of Madras. Case Referred No. 19 of 1948.

Madras City Municipal Act (*IV of* 1919), *schedule IV, rule* 15—*Appeal against order levying extra tax on property—Not maintainable without payment of the tax demanded—*

Amendment of property tax assessment books under which additional tax is to be levied—Provision under which additional tax is to be levied.

Without payment of the tax which is the subject-matter of the appeal to the Court of Small Causes that appeal will not be maintainable. The language of rule 15 of Schedule IV of the City Municipal Act is imperative and the Court of Small Causes would have no jurisdiction to entertain an appeal unless the requirements of rule 15 (*a*), clauses (i) and (ii) are satisfied. The requirement of clause (ii) is payment of the tax due under the order appealed against. It is not sufficient that the appellant had paid what according to him is the tax legally due from him.

No opinion pronounced on the other question ("whether after property tax in respect of a property has been demanded and paid for any half year, it is found as a result of subsequent amendment of Property Tax Assessment Books, that more should have been levied for that half year, the case is governed by section 137-B or by rule 3 of Schedule IV of the City Municipal Act?") as the appeal had to be dismissed *in limine.*

P. Srinivasa Aiyangar for Applicants.

Messrs. John and Row for Respondent.

K.S. ——— *Reference answered.*

Viswanatha Sastri, J. Ramaswami Reddiar *v.* Chinnaswami Reddiar.
3rd February, 1949. S. A. Nos. 729 and 1011 of 1946.

Sale of land—Right to repurchase within a fixed period—Time if of the essence of the contract.

Where a time limit has been laid down in the agreement for repurchase and where there is no question of mutual obligations the exceptional provision made for the benefit of the vendors must be exercised strictly within the time fixed. The right to repurchase in such a case is a mere option which must be exercised according to the strict terms of the contract. Time is of the essence of the contract in such a case and neither the fixing of a long period of seven years for the exercise of the option to repurchase nor the conveyance of a portion of the property to the vendors after the lapse of seven years will not render time not of the essence of the contract.

K. Bhashyam and *T. R. Srinivasan* for Appellants.

S. Jagadisa Aiyar, K. R. Krishnaswami Aiyar and *S. P. Subramanyam* for Respondents.

K.S. ——— *Appeal dismissed. Leave refused.*

Rajagopalan, J. Tiruchendur Sivathwaja Matam *v.* Sami Bhattar.
4th February, 1949. S. A. No. 725 of 1946.

Hindu Law—Inheritance—Bandhus—Brother's daughter and brother's daughter's son—Preference.

The brother's daughter's son is a preferential heir over the brother's daughter. It may be that the logic that underlay the Hindu Law of Inheritance Amendment Act (II of 1929) may justifiably be extended to provide for propinquity and not sex as the deciding factor for establishing rights of inheritance; but it is for the Legislature to decide whether a brother's daughter should be given preference over a brother's daughter's son.

It is well settled law in the Madras Province that a male bandhu is entitled to preference over a female bandhu.

I.L.R. 31 Mad. 321, followed and 97 I.C. 314, referred to.

K. S. Desikan for Appellant.

T. L. Venkatarama Aiyar for Respondents.

K.S. ——— *Appeal dismissed. Leave refused.*

Govinda Menon, J. Akkal Naicker *v.* Kumaraswami Reddiar.
8th February, 1949. C. R. P. No. 233 of 1947.

Limitation Act (IX of 1908), *section* 14 *and Article* 182 (5)*—Applicability—Decree passed by District Munsiff as Small Cause Judge in* 1939*—Successive execution petitions on*

the original side of same Court in 1941 *and* 1942 *successively dismissed and last execution petition pending in* 1945—*Decree-holder realising mistake and filing execution petition on small cause side—Limitation.*

A District Munsiff sitting as a Small Cause Judge passed a decree for a sum of money on 19th January, 1939 and the decree-holder filed successive execution petitions on the original side of the same Court. The first of them filed on 1st September, 1941, was dismissed for default of prosecution on 25th September, 1941. The second filed on 15th July, 1942 was dismissed on 19th February, 1943. A third application was filed on 17th July, 1943, and after various interlocutory and other orders was pending on 3rd September, 1945, when the decree-holder realised his mistake and filed an execution petition in the Small Cause Side. On a question of limitation,

Held, (1) the decree-holder is entitled to invoke the aid of section 14 of the Limitation Act and thereby deduct the period during which the three execution petitions were pending before the Original Side of the District Munsiff's Court, because he was *bona fide* prosecuting petitions for the same relief which the Court in which they were prosecuted could not give on account of want of jurisdiction.

But since the decree was passed on 19th January, 1939, and the correct execution petition was filed only on 3rd September, 1945, a period of six years seven months and 15 days had elapsed and deducting 2 years nine months and odd during which the petitions on the original side were actually pending there is a gap of three years and ten months and odd and that being more than three years as provided under Article 182 (5) of the Limitation Act, the application for execution is barred by time. It cannot be contended that the successive applications on the original side should be deemed to be continuations of the earlier applications as each of the three applications were distinct and separate.

M. Natesan for *V. Ramaswami Aiyar* for Petitioner.

V. P. Sarathy Amicus curiae for Respondent.

K.S. *Petition dismissed.*

Rajamannar, C.J. and *Raghava Rao, J.*
10*th February*, 1949.

Muhammad Unni *v.* Unniri.
A. A. O. No. 311 of 1947.

Madras Non-Residential Buildings Rent Control Order (1942), *clause* 8—*Scope—Suit for eviction in civil Court—If barred.*

The jurisdiction of a Civil Court to entertain and pass a decree in a suit for eviction by a landlord against his tenant is not expressly or impliedly taken away by the provisions of the Madras Non-Residential Buildings Rent Control Order.

(1945) 1 M.L.J. 44, dissented from ; (1946) 1 M.L.J. 134, (1946) 1 M.L.J. 135, (1948) 2 M.L.J. 359, and decision of Wadsworth, J., in S. A. No. 80 of 1946, referred to.

K. Kutikrishna Menon for Appellant.

G. Venkatachala Sastri and *N. Sundara Aiyar* for Respondent.

K.S.

Govinda Menon, J.
11*th February*, 1949.

Edward Mathuram *v.* Abdul Latiff Sahib.
A. A. O. No. 56 of 1949.
(C. R. P. No. 1403 of 1946, converted).

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 89—*Deposit without prejudice to the depositor's contentions on appeal and his right to recover the amount from decree-holders in the event of success in appeal—If entitles the depositor to get sale set aside.*

A previous purchaser of some items of properties from the judgment-debtor filed an application under Order 21, rule 89, Civil Procedure Code for setting

aside a sale in execution. Along with the deposit of the necessary amount, an application supported by an affidavit was filed. Paragraph 6 of the affidavit was in the following terms :—" Without prejudice to my contentions in the appeal and my right to recover it from the decree-holders in the event of my success in appeal, I am paying towards the decree lest the sale of the properties should be confirmed the amount due under the decree in full."

Held, the deposit was not valid under the law as it was not unconditional and therefore the person depositing the amount is not entitled to have the sale set aside.

(1935) 69 M.L.J. 349 : I.L.R. 58 Mad. 972 (F.B.), relied on and (1930) 59 M.L.J. 193 : I.L.R. 53 Mad. 943 (947), referred to.

The fact that no condition is put by the person depositing the amount upon the payment out of the money to the decree-holder does not make the deposit unconditional as in the affidavit the depositor wanted to keep alive the dispute as to the validity of the assignment in his favour.

S. V. Venugopalachari for Appellants.

S. Amudachari for Respondents.

K.S. ——— *Appeal allowed.*

Viswanatha Sastri, J.
15*th Feburary*, 1949.

Adinarayana *v.* Jagannadha Rao.
S. A. No. 1234 of 1947.

Specific Relief Act (I of 1877), section 27—Specific performance—Suit for—Defence—Subsequent purchase for value without notice—Onus of proof.

It lies upon the party seeking to defeat a prior contract (for sale of land) to prove that he is a purchaser for value *bona fide* and without notice of the previous contract. The initial burden is on the purchaser. It may be that very little evidence on the part of the purchaser is sufficient to discharge the onus in a particular case.

[The purchaser was found to have had notice of the contract and so had no defence to a suit for specific performance.]

K. Satyanarayana for Appellant.

C. V. Dikshitulu for Respondent.

K.S. ——— *Appeal dismissed. Leave refused.*

Govinda Menon, J.
15*th February*, 1949.

Kanniah Gupta *v.* Subbarami Reddi.
S. A. No. 723 of 1946.

Sale of land—Agreement for sale by members of joint family—One of them not signing agreement—Effect—Contract if incomplete or inoperative—Question of fact which cannot be subseject-matter of second appeal.

If a document is drawn up in the name of several persons and it is the intention of the parties that all should execute it, it will become incomplete and inoperative till all have done so, but it is a question of fact in each case as to what was the intention of the parties and cannot be the subject of a second appeal unless there is no evidence to justify the finding of the Court below. [Case law reviewed.]

K. Umamaheswaram and *B. Srinivasamurthi* for Appellants.

M. Seshachalapathi for Respondents.

K.S. ——— *Appeal dismissed. Leave refused.*

Rajamannar, C. J. and
Raghava Rao, J.
15*th February*, 1949.

Anandalwar *v.* Second Judge Court of Small Causes, Madras.
C. M. A. No. 164 and 165 of 1949.

Madras Buildings (Lease and Rent Control) Act, (XV of 1946), section 7 (2) (i)—Default in payment of rent—Right to evict—Tenant not making tender of monthly rent after

refusal of rent tendered for one month—Effect—Section 12 (4)—*Order of appellate authority—Not subject of revisional jurisdiction of the Court.*

It cannot be said that, merely because the rent due for one month has been improperly refused when tendered, the rent for succeeding months is neither due nor payable. Under section 7 (2) of Madras Act, (XV of 1946) the duty is cast on the tenant to make a payment or tender for every month, if he desires to take advantage of the provisions of the Act.

The order of the Court of Small Causes as an appellate authority cannot be the subject-matter of a revision to the High Court. (1949) 1 M.L.J. 74, overruled. No other remedy being available an application for a *writ of certiorari* is competent

C. S. Venkatachari and *S. Kuppuswami* for Petitioner.

S. S. Bharadwaj for the 2nd Respondent.

K.S. *Applications allowed.*

Govinda Menon, J.
16*th February*, 1949.

Eranna, *In re.*
Cr.R.C. No. 447 of 1948.
(Cr.R.P. No. 416 of 1948).

Criminal trial—Committal Court—Powers and duties—Sessions Court—When can set aside order of discharge by Committal Court.

No doubt, it is not the function of a Committal Court to weigh the evidence and pronounce a clear opinion as to whether a conviction will be sustained on the evidence before it. But it is its duty to see whether there is any *prima facie* evidence, which is not tainted with artificialities or incongruities. If there is some real evidence on which a Sessions Court can come to a conclusion then it should commit. Where there is an absence of a *prima facie* evidence and the evidence is false, an order of discharge by the Committal Court should not be set aside by the Sessions Judge.

P. Basi Reddi and *C. Kondiah* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. *Order of Sessions Judge set aside.*

Somasundaram, J.
16*th February*, 1949.

Mohammed Ibrahim Maracayer *v.* Ismail Maracayer.
Crl. M. P. No. 2398 of 1948.

Penal Code (*XLV of* 1860), *section* 504— *Gist of offence under—Letter written by father from Vellore to his married daughter in Madras—Insults to daughter and her husband contained in the letter—If constitutes offence under section* 504—*Domestic quarrel—Desirability of applying section* 95, *Penal Code.*

The contents of a letter written by a father from Vellore to his daughter in Madras though it may constitute an insult to the daughter and her husband would not constitute an offence under section 504 of the Penal Code. A likelihood of a breach of the peace as a result of the provocation must be present to constitute an offence under section 504 of the Penal Code. The likelihood of breach of peace must be immediately after the provocation or so soon afterwards that it must form part of *res gestæ*.

A mere insult however gross it may be is not sufficient to bring the case within the provisions of section 504 of the Penal Code.

Subbiah v. *Venkatasubbamma*, (1942) 2 M.L.J. 101, relied on.

Further in a case of this nature arising from a domestic quarrel section 95 of the Penal Code should be applied.

V. T. Rangaswami Iyengar and *A. Nagarajan* for Petitioner.

C. Narasimhachariar and *V. Veeraraghavachari* for Respondent.

G. Gopinath for the Crown Prosecutor on behalf of the Crown.

K.S. *Proceedings quashed.*

Rajagopalan, J.
17*th February*, 1949.

Kuppuswamy *v.* Gopal Nair.
C. R. P. No. 729 of 1948.

Madras Buildings (Lease and Rent Control) Act (XV of 1947)—Small Cause Court acting as appellate authority—Dismissal of appeal for default when appellants had an acceptable explanation for non-prosecution—Error of law—High Court's power to correct.

A rent control appeal had been transferred by the Chief Judge of the Court of Small Causes to (who was originally the appellate authority) to that of a Puisne Judge when the small Cause Court itself was appointed as the appellate authority. The appellant and his advocate were unaware of the transfer till after the dismissal of the appeal for non-prosecution on the same day. The Puisne judge declined to restore the appeal on the ground that he had no jurisdiction to reconsider the order of dismissal. On revision,

Held, since it was as a Court that the Small Cause Judge disposed of the matter, and since that Court is subject to the revisional jurisdiction of the High Court, when there is clear evidence that there was no real default on the part of the appellant, the dismissal of the appeal for apparent non-prosecution is an error of law that can be corrected by the High Court.

P. K. Janakiram Ayyar and *S. Krishnamachariar* for Petitioner.

A. B. Nambiar for Respondent.

K.S. *Petition allowed.*

Mack, J.
18*th February*, 1949.

Thayyal *v.* Baggyathammal.
C. R. P. No. 1751 of 1948.

Civil Procedure Code (V of 1908), *Order* 13, *rule* 1 *and Civil Rules of Practice (Madras) rule* 62—*Refusal to excuse delay in filing some of the documents and excusing delay as to documents for which there was no opposition by the other party—Arbitrary exercise of discretion—Revision.*

Where application is made to excuse delay in filing a number of documents the Judge cannot arbitrarily condone the delay as to documents for which there was no opposition and refuse to excuse the delay as to the other documents when there is no ground for any real discrimination between the items admitted and the items excluded. It is usual to apply rule 62 of the Civil Rules of Practice (Madras) with reasonable laxity and give parties time to get certified copies in view of the possibility of delay.

K. V. Ramachandra Aiyar for Petitioner.

R. Rajagopala Aiyangar for Respondents.

K.S. *Petition allowed.*

Mack, J. Kunhammad *v.* Athermankutti.
1st February, 1949. C.R.P. No. 85 of 1948.

Limitation (War Conditions) Ordinance (XXXIII of 1945), *section* 3—*Applicability to execution proceedings also.*

It cannot be said that the Limitation (War Conditions) Ordinance (XXXIII of 1945) applied only to suits and not to execution proceedings. The word "suit" in section 3 of the Ordinance is wide enough to cover all kinds of proceedings which a person absent on war service could have instituted and for which a period of limitation was specifically prescribed in the Indian Limitation Act. Such a person is given by the Ordinance six months' time to institute them after the termination of his detention.

Meaning of the word " suit " discussed.

S. Venkatachala Sastri for Petitioner.

Respondent not represented.

K.S. ——— *Petition allowed.*

Rajamannar, C.J. and Raghava Rao, J. Kunhaliyamma *v.* Kunhi Thayyi Mammod.
1st February, 1949. Appeal No. 452 of 1945.

Moplah Marumakkathayam Act (XVII of 1939), *sections* 13, 14 *and* 17—*Severance of status—When effected.*

Even in the case of a Moplah *tarwad* governed by Madras Act, XVII of 1939, so far as a *tavazhi* is concerned, severance of status is effected on its claiming to take its share of the properties of the *tarwad* and necessarily by its filing a suit for partition. Such a claim must be deemed to have been made when a notice demanding its share is given or at least when a suit is filed for that purpose.

After such severance of status an erstwhile *karnavan* cannot represent the *tarwad* and go on making alienations or renewals of *kanoms* binding on the other members of the family who had unequivocally expressed their intention to separate.

M. Chinnappan Nayar for Appellants.

M. K. Nambiar, V. P. Gopalan Nambiar and *A. Achutan Nambiar* for Respondents.

K.S. ——— *Appeal allowed.*

Raghava Rao, J. Venkataramanappa *v.* Narayana Murthy.
4th February, 1949. S.A. No. 615 of 1946.

Hindu Law—Debts—Costs ordered against father for unsuccessfully defending a suit by a widow challenging the adoption of his son to her husband—Whether avyavaharika.

Where a Hindu father unsuccessfully defends a suit by a widow for a declaration that his son was not the adopted son of the plaintiff's husband and costs are awarded against him, the son cannot subsequently claim that a sale in execution for the costs should be set aside or that the liability was an *avyavaharika* debt for which the son was under no liability under the pious obligation theory.

(1939) 2 M.L.J. 499 and 20 M.L.J. 89, distinguished. (1943) 2 M.L.J. 397 (P.C.), 21 L.W. 606 and I.L.R. 16 Mad. 99 (104), referred to.

C. Kondiah for Appellant.

V. S. Narasimhachar for Respondent.

K.S. ——— *Appeal allowed. Leave refused.*

Subba Rao and Panchapakesa Ayyar, JJ. Madhavi Amma *v.* Achuthan Nair.
7th February, 1949. Appeal No: 597 of 1945.

Malabar Law—Property acquired by members of tarwad—*If joint or separate property-Test—Presumption and onus*—Karnavan—*Alienation by—When valid—Renunciation—When valid.*

There is no presumption in law that when a Malabar family is joint it possesses any joint property or that all the property possessed by it is joint property. Where it is proved or admitted that a family possesses sufficient nucleus with the aid of which any member might have made the acquisition, the law raises the presumption that it is joint family property, and the onus is shifted to the individual member who is proved to have been in possession of the family funds to establish that the property was acquired by him without the aid of such funds. Whether the presumption should be raised and the burden of proof shifted and what weight should be given to that presumption depend on the facts and circumstances proved in each case and the presumption is one which the law raises where nothing is known except the bare fact of the nucleus and the acquisition.

In regard to property standing in the name of a *karnavan* where the *tarwad* has a nucleus sufficient for the acquisition, there is a very strong presumption that the property belongs to the *tarwad* but there is no such presumption when the property stands in the name of an *anandravan* unless it is proved that he had family funds with him at the time of the acquisition and that he could have acquired the property with such funds. Where with the consent of the members of a *tavazhi* an individual member or *karvanan* is allowed to have separate trade and acquire properties, the presumption ought to be that property acquired in the name of the individual member is separate property even though he might have monies of the *tavazhi* in his hands. The presumption raised in the case of acquisitions standing in the names of junior members of a joint Hindu family that they are joint family properties, will not apply to acquisitions by junior members of a Malabar *tarwad.*

A *karnavan* cannot grant a *melcharth* of *kanom* before the expiry of the prior lease unless benefit to the *tarwad* or necessity was proved.

A renunciation of a *karnavan's* post, if it is to be valid, must be unconditional and must recognise the senior *anandravan's* rights of succession.

T. Krishna Rao for Appellants.

K. Kuttikrishna Menon, V. Balakrishna Eradi and *C. Unikanda Menon* for Respondents.

K.S. ———— *Decree modified.*

Rajamannar, C.J. and Viswanatha Sastri, J. Lakshmi Ammal *v.* Srinivasa Ayyangar.
11th February, 1949. Appeal No. 566 of 1945 and No. 68 of 1946.

Trust—Founder of charity—Provision made by for devolution of trusteeship—Founder if can subsequently modify or alter.

Having made provision for the line of succession to the office of trustee in the original deed of dedication and not having reserved any right to alter such provision, the founder of a charity is precluded from altering it in any manner. Accordingly provisions modifying the devolution of trusteeship made in a deed of rectification will be invalid.

Whether properties were absolutely dedicated to the charity subject to the payment of certain allowances to members of the founder's family or whether the property remained in the ownership of the family subject to a charge for the performance of the charity depends entirely on a construction of the deed disposing of the property.

The Advocate-General (*K. Rajah Aiyar*) and *K. S. Desikan* for Appellant.

T. V. Ramanatha Aiyar, N. Rajagopala Aiyangar, A. Srirangachari and *E. A. Viswanathan* for Respondents.

K.S. ——— *Appeal dismissed.*

Rajamannar, C.J. and Raghava Rao, J. Easwara Ayyar *v.* Swetharanya Ayyar.
15th February, 1949. Appeal No. 29 of 1947.

Hindu Law—Joint family—Alienations by manager—When binding—Necessity—Test.

Legal necessity to support an alienation of family property need not necessarily imply in addition to the existence of a debt binding on the family actual pressure such as an imminent sale in Court auction or other initiation of legal proceedings. The real test is whether the alienation was made in the exercise of a reasonable discretion and could be justified as the act of a prudent mangaer.

[On the facts and circumstances the finding of the lower Court that the sale cannot be upheld as binding on the share of the other members of the family was affirmed.]

T. M. Krishnaswami Aiyar and *C. S Swaminathan* for Appellant.

D. A. Krishna Variar for Respondent.

K.S. ——— *Appeal dismissed.*

Subba Rao, J. Unnooli *v.* Subramaniam.
19th February, 1949. C.R.P. No. 940 of 1947.

Madras Tenants and Ryots Protection Act (XVII of 1946)*—Usufructuary mortgagee and sub-lessee—If " tenant " entitled to deposit arrears of rent and ask for stay.*

A usufructuary mortgagee is a tenant who is entitled to relief under Madras Act XVII of 1946. Decision in C.R.P. No. 1090 of 1947 followed.

So also a sub-lessee is entitled to the benefits of the Act and can apply for stay under the Act.

Decision of Yahya Ali, J., in C.R.P. No. 1711 of 1947 distinguished.

S. Venkatachala Sastri for Petitioner.

K. P. Ramakrishna Aiyar for Respondent.

K.S. ——— *Petition allowed.*

Panchapakesa Ayyar, J. Amikutty Amma *v.* Ramchen Nadungadi.
19th February, 1949. A.A.A.O. No. 32 of 1947.

Civil Procedure Code (V of 1908)*, section* 39 (1)*—Person entitled to restitution under a decree because of the variation of the decree owing to its scaling down under Madras Act IV of* 1938*—Right to have the decree transferred to another Court for execution.*

" Decree-holder " has been defined in section 2 of the Civil Procedure Code "as any person in whose favour a decree has been passed or an order capable of execution has been made." So, a defendant entitled to recover costs from the plaintiff in a suit which is dismissed will be a " decree-holder " and can get the decree transferred to another Court to recover his costs. So too, a person entitled to restitution (under a decree) by a variation of the decree owing to the scaling down under the Madras Agriculturists' Relief Act, as there is an order for restitution capable of being executed. Section 39 (1), Civil Procedure Code, will therefore

enable such a person also to get a transfer of the decree to another Court for executing it and getting restitution.

B. Pocker and *P. A. Quadir Meeran* for Appellant.

K. Kuttikrishna Menon and *V. Balakrishna Eradi* for Respondent.

K.S. ——— *Order set aside. Appeal remanded.*

Subba Rao and Panchapakesa Ayyar, JJ.
19*th February*, 1949.

Ramachandra Venkatakrishna Rao *v.*
Balasuryaprasada Rao.
Appeal. No. 264 of 1945.

Will—Validity—Motive and intention—Difference—Relief as to existence of enmity of brothers based on exaggeration of facts—If hallucination invalidating will.

There is always a distinction between the exaggeration of a fact by a testator, like the enmity of his brother towards him exaggerated into a murderous intention on the part of that brother, and a mere delusion and imagining of a thing which had no existence at all, like a man's thinking that he has a child when he has none or that he has none when he has one without any conceivable reason for that statement. A will made under a delusion will he invalid but not one made by the testator after exaggeration of a fact.

A man may make a will from various motives, and the law in general, will not be concerned with such motives. It is primarily concerned with his intention. The motives connot affect the validity or enforceability of a will.

Where a testator was in full possession of his bodily and mental faculties when he executed a will and did not forget his brother but because of the existence of enmity between the brother and himself which had generated in him a fixed belief that his brother was intent on getting his properties, if need be, by getting him killed by poisoning or by violence, the will cannot be said to be invalid or unenforceable as one made under a hallucination.

Battan Singh v. *Amishand*. 61 L.W. 428 (P.C.) distinguished.

T. V. Muthukrishna Ayyar and *S. Ramamurthi* for Appellants.

V. Parthasarathi, *T. Satyanarayana*, *K. V. Rangachari*, *K. Kameswara Rao* and *E. Venkatesam* for Respondents.

K. S. ——— *Appeal dismissed.*

Subba Rao and Panchapakesa Ayyar, JJ.
21*st February*, 1949.

Padmaraya Shetty, *In re.*
R.T. No. 122 of 1948
(Cr.A. No. 667 of 1948, etc.).

Criminal trial—Approver's evidence—Corroboration necessary—Confession of co-accused —Value of—Evidence Act (I of 1872), section 30—Scope.

Section 30 of the Indian Evidence Act does not compel a Court to accept the confession of a co-accused as corroboration of the approver's evidence. It only empowers the Court to take into consideration such confession as against the person jointly tried with him or against the person who makes such a confession. Though an accomplice's evidence is legal evidence and is not excluded by any of the provisions of the Evidence Act, as a rule of practice such evidence should not be accepted as corroborative evidence. The same principle should apply even in the case of a confessional statement. Case-law reviewed.

Scope of section 34 of the Penal Code considered.

M. K. Nambiar, *B. Punyakoti Chetty* (*amicus curiæ* for 2nd accused) and *M. Santosh* for Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ——— *Conviction of accused Nos. 5 to 9 set aside and sentences on other accused modified.*

Mack, J. Mahalingam Asari *v.* Lakshmana Reddiar,
22nd February, 1949. C.R.P. Nos. 265 and 1392 of 1947.

Practice—Plaintiff coming to Court with extremely exaggerated and substantially false case based on a substratum of truth—Proper course for Courts to adopt when defence also is exaggerated or false.

The only way in which plaintiffs can be stopped from coming to Court with extremely exaggerated and substantially false cases based on a substratum of truth is by dismissing such suits *in toto* if the Court has good reason to believe that they have not disclosed the truth in their plaints and evidence. It is impossible to expect a Court to ferret out the exact truth between two extreme positions in all cases. Where a plaintiff filed a small cause suit in Subordinate Judge's Court against a goldsmith claiming the return of gold given for making jewels, and the goldsmith filed a separate suit in the Panchayat Court claiming making charges alleging that the jewels had been made and delivered and both versions were exaggerated both the suits were directed to be dismissed without costs.

S. V. Rama Ayyangar for Petitioner.

S. T. Srinivasagopalachariar for Respondent.

K.S. ——— *Decrees set aside.*

Somasundaram, J. The Public Prosecutor *v.* Tirugnanam.
22nd February, 1949. Cr. A. No. 352 of 1948.

Prevention of Corruption Act (II of 1947), *section* 3—*Investigation by Circle Inspector into cognizable offence instead of by Deputy Superintendent—Effect of irregularity on jurisdiction of Court to take cognizance of offence and convict.*

Where a cognizable offence was investigated by a Circle Inspector instead of a Deputy Superintendent of Police and no orders of a Magistrate had been obtained for that purpose the investigation is no doubt irregular and cannot be approved. But however irregular the investigation may be, the jurisdiction of the Court to take cognizance of the offence or the validity of the proceedings before it is not affected. 40 Bom.L.R. 821, relied on. The failure to comply with the provisions of the proviso to section 3 of Act II of 1947 does not affect the proceedings or vitiate the conviction.

The Public Prosecutor (*V. L. Ethiraj*) for Appellant.

V. V. Srinivasa Ayyangar and *V. Devarajan* for Respondents.

K.S. ——— *Appeal dismissed.*

(Full Bench).

Horwill, Govinda Menon and Balakrishna Ayyar, JJ. Thiruvengadasami Naidu *v.*
24th February, 1949. Municipal Health Officer, Karaikudi.
Cr.R.C. No. 811 of 1947.
(Cr. R. P. No. 704 of 1947).

Madras District Municipalities Act (V of 1920), *section* 249—*Prosecution for running an oil mill after licence to do so had been refused—Court if can go into legality or otherwise of the refusal of licence.*

In a case where a person is prosecuted for carrying on an industry or trade for which a licence to do so has been refused, it is open to the Court to find out whether

the order of the Statutory Body was made without jurisdiction; whether on the face of it the order is illegal or whether it is unreasonable, revolting or repugnant to conscience. But where the order is in the legitimate exercise of jurisdiction vested in the Statutory Body and passed *bona fide* after considering the evidence before it, even if the order is wrong on the merits, the Court cannot hold that it is wrong. It is not the function of the Court to substitute its judgment as an appellate authority for that of the Statutory Body. In cases where the party pleads that no licence is necessary, it is one of jurisdiction. But where the plea is that even though a licence is necessary it has been refused on the merits, the plea cannot be considered as one involving jurisdiction at all. [Case-law discussed.]

The action of a municipality in refusing the licence to run an oil mill on the ground that the premises are situated in a residential area cannot be said to be without jurisdiction. Further, where the party aggrieved has not availed himself of the remedy of filing a suit for injunction or resorting to one of the prerogative *writs* allowed by the law, it is not open to him in a prosecution for carrying on an industry or trade (in this case running an oil mill) after a licence to run it has been refused to contend that the licence should have been given to him and that the order of the executive authority is wrong on the merits.

K. Virasami for Petitioner.

K. M. Murugappa Chettiar for Respondent.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

K.S. ——— *Petition dismissed*

Subba Rao, J. Kunharmu *v.* Raman Nambisan.

24th February, 1949. C.R.P. No. 1253 of 1948.

Madras Tenants and Ryots Protection Act (*XVII of* 1946)—Panaya Kychitdar—*Not a "tenant" under the definition in Malabar Tenancy Act.*

Under a *panayam kychit* the defendant paid a *panayam* of Rs. 50 to the plaintiff. Every year the defendant was to pay the plaintiff Rs. 18 after deducting the interest on the *panayam* and costs of repairs, and after the expiry of the period fixed when the *panayam* amount is paid the defendant was to put the plaintiff in possession of the properties. In a suit by the plaintiff for possession the defendant, after Madras Act XVII of 1946 came into force, asked for a stay under that Act claiming that he was a lessee.

Held: The non-inclusion of "*panaya kychitdar*" in the definition of a "tenant" under the Malabar Tenancy Act shows that the Legislature did not intend to include him in the definition of "tenant." The suit document was clearly a usufructuary mortgage, and not a lease and the defendant was not entitled to have the suit for recovery of possession stayed under Madras Act XVII of 1946.

K. P. Ramakrishna Aiyar for Petitioner.

T. Raman Nambisan and *K. N. Karunakaran* for Respondent.

K.S. ——— *Petition dismissed.*

Subba Rao and Panchapakesa Ayyar, JJ. Lakshmanan Chettiar and others, *In re.*

24th February, 1949. Cr.R.C. No. 157 of 1948.

(Cr.R.P. No. 149 of 1948).

Industrial Disputes Act (XIV of 1947), *section* 34—*Failure of management to implement award—Government if can delegate its power to file the complaint to a Magistrate.*

When there is a failure of an administration to implement the award of an industrial Tribunal, the Government concerned must satisfy itself whether the facts existed for making the complaint and it has no power to delegate its duty to some other person (for example the District Magistrate).

Alladi Krishnaswami Ayyar and *M. R. Narayanaswami* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. —————— *Petition allowed.*

Satyanarayana Rao and Viswanatha Sastri, JJ. Om Prakasha Gupta, *In re.*

28th February, 1949. Cr.M.P. No. 400 of 1949.

Criminal Procedure Code (V of 1898), *sections* 151 *and* 491—*Preventive detention under section* 151—*Discretion of Police officer in making—If can be canvassed or questioned in proceedings under section* 491 *of the Code of Criminal Procedure.*

The object of section 151, Criminal Procedure Code, is to prevent the commission of an offence which a person designs or intends to commit. The facts are not capable of investigation in order to find out whether, in fact, a cognizable offence was intended to be committed or not, as the offence would still be at the stage of an intention and would not have passed into the region of facts. Section 151 authorises a police officer to arrest if he had " knowledge " that the person sought to be arrested entertained a design to commit a cognizable offence; it must also further "appear" to the police officer that the commission of offence could not be otherwise prevented. Both the " knowledge " and the " appearance " are those of the police officer concerned and are not capable of an independent investigation. It is not open to the Court exercising jurisdiction under section 491 of the Criminal Procedure Code to go into the question whether, in fact, the police officer was justified in concluding that the person sought to be arrested was about to commit a cognizable offence and whether the police officer was equally justified in concluding that there was no other means by which the perpetration of the offence could have been prevented.

S. Suryaprakasam for Petitioner.

The Crown Prosecutor (*Govind Swaminathan*) on behalf of the Crown.

K.S. —————— *Petition dismissed.*

Rajamannar, C.J. and Balakrishn Ayyar, J. Denham *v.* Denham.

28th February, 1949. C.M.P. No. 688 of 1949.

Husband and wife—Decree for dissolution of marriage—Appeal by husband against decree nisi—*Wife supporting the decree appealed against—If entitled to order against husband for payment of costs in advance to enable her to contest the appeal.*

The rationale of the rule for making the husband supply the wife with funds to conduct a suit for dissolution of the marriage are two fold : firstly, the doctrine of common law agency of necessity and secondly, public policy in relation to the

protection of the married status. But in a case where after a decree *nisi* has been passed for dissolution of the marriage the huband appeals and the wife wants to support the decree directing a dissolution of the marriage, neither of those grounds can exist. Obviously after the decree the wife cannot pledge her husband's credit and it cannot be said that she is seeking to protect the married status. The husband cannot be directed to furnish the wife (respondent) with funds to conduct the appeal, but he can be directed to furnish security for costs of the appeal.

K. K. Sridharan for Petitioner.

I. A. Salam for Respondent.

K.S. ——— *Order accordingly.*

Govinda Menon, J. Ratnam Pillai *v.* Pakkirisami Naidu.

28th February, 1949. S.A. No. 1394 of 1946.

Mortgage—Puisne mortgagee's suit in which first mortgagee has not been impleaded—Sale on foot of decree in—If bars right of puisne mortgagee to redeem first mortgage.

A puisne mortgagee cannot be prevented from redeeming the first mortgage simply because in a suit by him without impleading the first mortgagee, (which he is not bound to do) a decree has been obtained on foot of which a sale has taken place. He has a right to redeem the first mortgagee in cases where he by bringing a suit on his mortgage has stepped into the shoes of the mortgagor.

K. V. Srinivasa Aiyar for Appellant.

K. S. Desikan and *V. Balakrishna Eradi* for Respondent.

K.S. ——— *Appeal dismissed. Leave refused.*

Govinda Menon, J. Tadulingam Mudaliar *v.* Sakuntala Bai.

3rd March, 1949. C.R.P. No. 12 of 1949.

Elections—Petition challenging validity of election—Order for inspection of ballot papers—If can be made without notice to the successful candidates.

In a petition challenging the validity of the election of the successful candidates for a division of the Madras Corporation the Chief Judge of the Court of Small Causes on the petitioner's application for production and deposit of the ballot papers, electoral rolls and other papers and for leave to inspect them, gave notice only to the Commissioner of the Corporation of Madras and ordered inspection to be given at the Corporation Office. No notice of the application was given to the successful candidates. On a revision petition by one of the successful candidates,

Held: In a case of this kind the maxim *audi alteram partem* has to be applied. No order should have been passed without hearing the opposite side. Further, in such a case the Court before ordering inspection must be satisfied by evidence on oath that it is reasonably and *bona fide* necessary to have such inspection. The power of ordering inspection of the ballot papers should be exercised by the election Court with the greatest circumspection.

S. G. Rangaramanujam for Petitioner.

K. C. Subramanyam for *Messrs. John and Row, H. Neelakantan* for *Messrs. Short Bews and Co.*, and *M. R. Vijayarangam*, for Respondents.

K.S. ——— *Petition allowed.*

Rajamannar, C.J. and Balakrishna Ayyar, J. Subramanyam *v.* Narayanamma.
21st February, 1949. Appeal No. 12 of 1946.

Hindu Women's Rights to Property Act (XVIII of 1937)—Lands used as salt pans for producing salt under a licence from the Government—Not agricultural lands, and are therefore governed by the Act for purposes of devolution.

In coming to the conclusion whether a land is agricultural or not a common-sense test must be applied according to which the general character of the land may be determined. Such a test should not be based upon hypothetical possibilities or potentialities which are merely notional and not practicable. This test to a large extent would consist in the use of the land for such a long course of time that it may be taken to indicate its general character.

Where certain lands have always been used as salt pans for the purpose of manufacture of salt, the lands cannot be said to be agricultural lands. Devolution to such lands will be governed by Act XVIII of 1937.

I.L.R. 50 Mad. 763 : 53 M.L.J. 377, applied.

A.I.R. 1944 Cal. 421, distinguished.

K. Bhimasankaram for Appellants.

P. Somasundaram and *P. Suryanarayana* for Respondent.

K.S. *Appeal dismissed.*

Govinda Menon, J. Ma-Unath-Ul-Islam Association, Ponnani *v.* Panchayat Board, Ponnani.
23rd February, 1949. S.A. No. 832 of 1946.

Madras Local Boards Act (XIV of 1920), section 99—Registered association the objects of which are to provide religious instructions for new converts to Islam—Building used for housing, feeding and clothing the converts and imparting religious instruction—If exempt from tax—Repeal of section 99 by Madras Act XI of 1946—Effect.

Where the object of an association was to provide religious instructions for new converts to Islam and the buildings owned by the association were used for housing, feeding, clothing and generally looking after and giving religious instructions for new converts to Islam for periods of three months or so immediately after the conversions the dedication cannot come within any of the exemptions mentioned in section 99 of the Madras Local Boards Act. In any event Madras Act XI of 1946 has repealed section 99 of the Madras Local Boards Act and the exemptions contained therein can no longer be availed of to claim exemption from the payment of property tax to the Local Board.

Case-law discussed.

B. Pocker for Appellants.

D. A. Krishna Wariar for Respondent.

K.S. *Appeal dismissed. Leave refused.*

Mack, J. Chunilal *v.* Governor-General in Council.
23rd February, 1949. C.C.C.A. No. 56 of 1947.

Railways Act (IX of 1890), sections 78 and 58 (1)—Scope and effect—Consignment of pencils, nibs, needles, etc., described in forwarding note as "stationery-pencils"—Loss of consignment—Liability—Value of goods more than that declared by consignee—If can be relevant.

There is no statutory obligation on a consignee of a box containing miscellaneous articles, like lead and colour pencils, brass nibs, sewing machine needles and playing cards, to hand in a precise invoice describing separately every article in it. All that section 58 of the Railways Act contemplates is a description of such a general nature as may be sufficient to determine the correct freight chargeable. The description of the consignment as "stationery-pencils" in the forwarding note cannot be regarded to be materially false so as to absolve the railway of liability to pay compensation for the loss of the consignment.

Where a consignor takes it upon himself specifically to value a box and its contents consigned by rail it is not open to him to claim from the railway company anything in excess of that valuation and to contend that the box contained more

valuable things, which the railway company may have great difficulty in refuting. He cannot recover more than the value declared by him though the Court may find that the box contained goods of greater value.

Ramanujam and *Venkataseshayya* for Appellants.

V. K. Ramanatha Aiyar for *King and Partridge* for Respondents.

K.S. —————— *Decree modified.*

Mack, J. Narayanaswami Reddi *v.* Veerappa Chettiar.
23rd February, 1949. C.R.P. No. 1063 of 1948.

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 97—*Application for removal of obstruction—Dismissal as not pressed—Effect—Subsequent execution petition—Fresh application under Order* 21, *rule* 97—*Not barred.*

There is no specific provision in the Code of Civil Procedure under which any matter can be " dismissed " as " not pressed " though such an order is frequently passed on Execution Petitions which at the option of the decree-holder he does not press further for the time being. The more correct order on such a petition should be " Not pressed—Struck off."

Where an application under Order 21, rule 97 of the Civil Procedure Code for removal of an obstruction was filed one day beyond time and was dismissed as " not pressed " a fresh application under Order 21, rule 97 for removal of the obstruction filed in a subsequent execution petition will not be barred by law as no order under Order 21, rule 98 or rule 99 was in fact passed in the earlier application for removal of obstruction.

K. V. Ramachandra Ayyar for Petitioner.

R. Kesava Aiyangar for Respondent.

K.S. —————— *Petition dismissed.*

Rajamannar, C.J. and Balakrishna Ayyar, J. Venkatarayudu *v.* Seshamma.
24th February, 1949. Appeal No. 9 of 1946.

Hindu law—Adoption by widow—Consent of nearest sapinda—Refusal on the ground that proposed boy was not a sapinda, sagotra or gnati—*Propriety and effect.*

It may be that in a case where the *sapinda* refused his consent to the adoption of a boy by a widow on the ground that the boy was disqualified, say, on the ground of leprosy or idiocy, the refusal would be proper. But a refusal on the ground that the proposed boy was not a *sapinda* or *sagotra* or a *gnati* will not be proper and an adoption made with the consent of remoter *sapindas* in such a case will be valid.

13 M.L.J. 239 : I.L.R. 26 Mad. 627 and 1915 M.W.N. 236, referred to and distinguished.

K. V. Rangachari for Appellants.

Alladi Kuppuswami for Respondent.

K.S. —————— *Appeal dismissed.*

Viswanatha Sastri, J. Venkataswami *v.* Mahalakshmi.
24th February, 1949. S.A. No. 670 of 1946.

Madras Court of Wards Act (*I of* 1902), *section* 49—*Notice required by—Waiver by Court of Wards—Competence and effect.*

It is quite competent to the Court of Wards to waive the notice required to be given by section 49 of the Madras Court of Wards Act, even assuming that the meaning and scope of the section is the same as that of section 80, Civil Procedure Code.

Case-law reviewed and I.L.R. 1948 Mad. 214 : (1947) 2 M.L.J. 208 (P.C.), relied on.

Waiver is an abandonment of a right and may be express or implied from conduct and to be effectual must be by a person who has full knowledge of the facts. A person who has taken a plea based on the want of notice to which he is entitled, may waive it and allow the action to proceed as though the required notice had

been given to him and this can be done so long as the action is pending and has not been finally determined. It cannot be said that there cannot be a waiver after objection as to want of notice had been raised in the written statement filed by the Court of Wards.

The plea as regards the want of statutory notice is only available to the Court of Wards which is entitled to such notice and not to the other defendants after the Court of Wards itself waived the objection. Such waiver on the part of the person principally concerned affects the other parties as well.

E. Venkatesam for Appellants.

P. Somasundaram and *S. Venkatesa Aiyangar* for Respondents.

K.S. ——— *Appeal dismissed. Leave refused.*

Mack, J. Pichireddi *v.* Sri Vighneswara Swami Varu.
28th February, 1949. C.R.P. No. 269 of 1947.

Madras Hindu Religious Endowments Act (*II of* 1927), *section* 44-*B* (2) (*d*)—*Collector acting under—Not a Court whose orders are liable to revision by the High Court.*

The Collector acting under section 44-B (2) (*d*) of the Hindu Religious Endowments Act is not a Civil or Revenue Court whose orders are liable to revision under section 115 of the Civil Procedure Code.

K. Umamaheswaram for Petitioner.

Alladi Kuppuswami for Respondent.

K.S. ——— *Petition dismissed as not maintainable.*

Mack, J. Murahari Rao *v.* Bapayya.
1st March, 1949. C.R.P. No. 5 of 1948.

Civil Procedure Code (*V of* 1908), *Order* 37, *rules* 2 *and* 3—*Application for leave to defend made after the time fixed for it in the summons—Court's discretion to condone delay and grant the relief even if there is no statutory provision.*

It is not necessary that every procedural order of a Court should be supported by a specific statutory provision, and when there is neither provision nor prohibition it has to be guided by ordinary principles of common sense, justice, equity and good conscience.

The Court has ample discretion to give a defendant leave to defend a summary suit filed under Order 37, notwithsanding the fact that he has not appeared within the ten days of the service of the summons on him as required by the summons. Though there is no specific provision in Order 37, rule 2 or in the Limitation Act empowering a Court to condone a delay, in appearance beyond the ten days prescribed by the summons, the Court has ample discretion to condone the delay and give leave to defend.

V. Suryanarayana for Petitioner.

N. B. V. Sankara Rao for Respondent.

K.S. ——— *Petition dismissed.*

Govinda Menon, J. Andi *v.* Kunju.
2nd March, 1949. S.A. No. 1100 of 1947.

Lease—Surrender of property covered by registered lease deed—Requirements—Evidence of subsequent oral lease—Admissibility.

Section 92 of the Evidence Act or proviso (4) cannot stand in the way of the lessors proving that there had been an implied surrender of registered leases and the creation of a consolidated oral lease. There is no provision of law which compels a lessee surrendering property after the efflux of time to do so with the accompaniment of a registered surrender deed. If he, by a unilateral act of his puts the lessor in possession, which possession is accepted by the lessor, then the surrender of the lease becomes complete. It can be done by an overt act of which evidence can be given or such a surrender can be inferred by subsequent conduct of parties.

D. A. Krishna Wariar and *T. V. Raman* for Appellants.

K. Kuttikrishna Menon and *T. C. Raghavan* for Respondents.

K.S. ——— *Appeal allowed in part. No leave.*

Mack, J. Chandappa Indra *v.* Jagathpala.
3rd March, 1949. C.R.P. No. 1265 of 1947.

Civil Procedure Code (V of 1908), *Order* 1, *rule* 8—*Conditions for the operation of—Representative suit—Leave to file—Criterion for granting.*

The first condition for the operation of Order 1, rule 8 of the Code of Civil Procedure is that there should be "numerous persons having the same interest in the one suit". In such a case, one or more of such persons may, with the permission of the Court, sue or be sued on behalf of all persons so interested. It is not necessary that all members of a sangam or of an association should have an identical interest in the suit. There may be opposition between two groups and *bona fide* representatives of each group can file a representative suit to have such disputes resolved under Order 1, rule 8, to save multiplicity of suits. The sole criterion is whether the plaintiff or the plaintiffs are representatives of numerous persons having the same interest in one suit. The mere fact that 12 members of the sangam have appeared and filed affidavits dissociating themselves from the proposed suit and strongly opposing the plaintiff, would not *per se* deprive the plaintiff of his right to file a representative suit. But where the plaintiff takes no steps to rebut the affidavits by bringing before the Court any representatives of the numerous body whom he claims to represent, leave cannot be granted.

T. Krishna Rao for Petitioner.

K. Y. Adiga and *K. P. Adiga* for Respondent.

K.S. ——— *Petition dismissed.*

Mack, J. Kandaswami Goundan *v.* Krishnamma Naidu.
4th March, 1949. C.R.P. No. 1003 of 1948.

Civil Procedure Code (V of 1908), *Order* 21, *rule* 89—*Usufructuary mortgagee from decree-holder directed in the mortgage deed to pay money in Court and get attached house released*—Locus standi *to file application under Order* 21, *rule* 89.

A usufructuary mortgagee from the decree-holder directed in the mortgage deed to pay the money in Court and get the attached house released has a *locus standi* to file an application under Order 21, rule 89 of the Code of Civil Procedure. He cannot be said to be a person who does not have an interest in the property brought to sale. The clause in the mortgage deed directing payment of the amount gave that mortgagee sufficient legal power to make the deposit and to file an application under Order 21, rule 89, though he was not a party to the proceedings.

(1945) 1 M.L.J. 66 : I.L.R. 1945 Mad. 566, referred to.

(1943) 2 M.L.J. 281, distinguished.

K. V. Ramaseshan for Petitioner.

R. Desikan for Respondent.

K.S. ——— *Petition allowed.*

Govinda Menon, J. Tripurasundaramma *v.* Venkateswarulu.
4th March, 1949. S.A. Nos. 782 and 783 of 1946.

Lease—Lease for agricultural purposes—Court's discretion to relieve against forfeiture for non-payment of rent even where the lease provides for a period of grace for payment.

Courts in India have power to relieve against forfeiture for non-payment of rent even in cases where a period of grace is allowed for payment by the lease deed and this rule applies equally to a lease for agricultural purposes.

Case-law discussed.

P. Somasundaram and *E. Subrahmanyam* for Appellants.

Y. G. Krishnamurthi for Respondents.

K.S. ——— *Appeals dismissed. Leave refused.*

Mack, J. Mutyalamma *v.* Narayanaswamy.
4th March, 1949. C.R.P. No. 1845 of 1947.

Civil Procedure Code (V of 1908), *Order* 6, *rule* 17—*Amendment which may help to bring a plaint really within the jurisdiction of a higher Court within the jurisdiction of the Court in which plaint is originally filed—Propriety of allowing.*

It is ordinarily not open to a District Munsiff though there may be some, exceptional circumstances which may justify this course, to allow an amendment of any plaint which may help to bring a doubtful plaint really within the jurisdiction of a higher Court within his own jurisdiction. It is ordinarily his duty first to decide his own jurisdiction to try the original plaint filed before him.

M. S. Ramachandra Rao for Petitioner.

B. V. Ramanarasu for Respondent.

K.S. ——— *Petition allowed.*

Viswanatha Sastri, J. Sankara Pursa *v.* Govinda Bhatta.
4th March, 1949. A.A.A.O. No. 82 of 1947.

Receiver—Execution sale after decree on mortgage—Decree-holders with leave to bid and set-off purchasing—Sale if valid when one of the decree-holders had been appointed receiver in the suit.

A purchaser in a sale in execution of a mortgage decree by a receiver in the suit without the leave of the Court is liable to be set aside on that ground or for that reason alone, without any enquiry as to whether any person interested in the property has been in fact prejudiced. A grant of permission to the decree-holders (one of whom was a receiver) to bid at a Court auction and to set-off the decree amount under Order 21, rule 72, Civil Procedure Code, is not equivalent to the grant of permission to the receiver to bid at the Court sale and buy the property in his possession. The two things are quite distinct and must be separately applied for and sanctioned by the Court.

Having regard to the fact that the receiver is in possession of the property and has opportunities of knowing all the details about the income and value of the property—information which is not ordinarily available to the outside public—Courts will not authorise a receiver to bid at a sale in the absence of special circumstance. The fact that only one of the decree-holders (two brothers) was a receiver would not protect both of them at the Court sale.

T. Krishna Rao for Appellants.

K. Vittal Rao for Respondents.

K.S. ——— *Appeal dismissed. Leave refused.*

Rajamannar, C.J. Vellingiri Naicken *v.* Sree Patteswaraswami Devasthanam.
7th March, 1949. C.R.P. No. 92 of 1947.

Civil Procedure Code (*V of* 1908), *Order* 1, *rule* 8 *and Order* 33, *rule* 1, *explanation* (iii)—*Application for leave to file a representative suit* in forma pauperis—*Test of pauperism.*

When a plaintiff sues in a representative capacity, the question of pauperism shall be determined with reference to the means possessed by him in such capacity. For instance, the particular plaintiff suing in a representative capacity may be himself a pauper; but if he is suing on behalf of other persons who cannot be described to be paupers, he is certainly not entitled to the benefit of Order 33 by reason of his pauperism.

T. K. Subramania Pillai for Petitioner.

K. V. Ramachandra Aiyar, S. T. Srinivasagopalachari and K. R. Rangaswami Aiyangar for Respondents.

K.S. ——— *Petition dismissed.*

Satyanarayana Rao and Viswanatha Sastri, JJ. Surendra Babu, *In re.*
8th March, 1949. Cr.M.P. No. 92 of 1949.

Madras Maintenance of Public Order Act (*I of* 1947), *section* 3 (1)—*Discretion of authority as to particulars to be provided to detenu—Irregularity in compliance with provisions of section* 3 (1)—*Effect.*

The detaining authority alone has to decide that the grounds which it was bound to serve are sufficient and that no further particulars need be given, to enable

the detenu to submit his explanation. The discretion of deciding what particulars are sufficient to enable the detenu to make a representation is vested in the authority and that discretion cannot be canvassed in an application under section 491, Criminal Procedure Code.

Non-compliance with the provisions in section 3 (1) of the Act relating to particulars, would not affect the legality of the detention and it being merely an irregularity in observing the procedure laid down under section 3 (1) and in respect of which the authority concerned has an absolute discretion even the continuance of the detention would not thereby become illegal.

A.I.R. 1949 All. 148, distinguished.

A. Ramachandran of *Rao and Reddy* for Petitioners.

The Crown Prosecutor (*Govind Swaminathan*) on behalf of the Crown.

K.S. ——— *Petition dismissed.*

Satyanarayana Rao and Viswanatha Sastri, JJ. 'Abdul Azeez *v.* Basil Johnson.
9th March, 1949. O.S.A. Nos. 15 and 16 of 1947.

Letters Patent (Madras), clause 15—Order dismissing a defendant's application to implead a stranger as a party to the suit—Not a "judgment" which is appealable.

An order dismissing a defendant's application to implead a stranger as a party to the suit is not a "judgment" within the meaning of clause 15 of the Letters Patent (Madras) and an appeal against such an order is incompetent.

I.L.R. 54 Mad. 491 and 64 M.L.J. 493 : I.L.R. 56 Mad. 689 relied on.

21 M.L.J. 1 : I.L.R. 35 Mad. 1 (F.B.), referred to.

I.L.R. 24 Mad. 252, distinguished.

P. K. Janakiram for Appellant.

C. Krishnaswami Aiyar and *Messrs. Short Bewes & Co.* for Respondents.

K.S. ——— *Appeals dismissed.*

Satyanarayana Rao and Viswanatha Sastri, JJ. Dasappa, District Magistrate *v.* South Kanara.
10th March, 1949. Cr. M.P. No. 2633 of 1948.

Criminal Procedure Code (V of 1898), Section 151 and Madras Act (I of 1947), sections 2 and 4—Arrest under section 151, Criminal Procedure Code—Subsequent order of detention under Madras Act I of 1947—Propriety and validity.

It cannot be said that simply because a man has been arrested under section 151 of the Criminal Procedure Code (in respect of a cognisable offence wholly unconnected with public safety or maintenance of public order) the powers under Madras Act I of 1947 could not be exercised and the person so arrested could not be detained thereunder. Where the action under Madras Act I of 1947 was not actuated by any ulterior motive or improper purpose and the previous arrest under section 151, Criminal Procedure Code, was made not with a view to attain that object, it cannot be said that the order for detention under Madras Act I of 1947 was made *mala fide.*

The pendency of an application under section 491 of the Criminal Procedure Code is no bar to the Provincial Government to pass the necessary orders in connection with the detention.

The Court cannot investigate the sufficiency of the materials or the reasonableness of the grounds upon which the Government or the empowered authority or officer was satisfied that it was necessary in the interests of public safety and order to detain the person concerned.

N. S. Mani for *Rao and Reddy* for Petitioner.

N. T. Raghunathan for the Public Prosecutor on behalf of the Crown.

K.S. ——— *Application dismissed.*

Panchapagesa Sastry, J.
16th February, 1949.

Tansukharai M. Karundia *v.* The Official Liquidator, Andhra Paper Mills Co., Ltd.
Application No. 3309 of 1948 in O. P. No. 235 of 1947.

Companies Act (*VII of* 1913), *section* 109 (f)—*Document creating security over company's assets—Validity—Tests—Registration with Registrar of Joint Stock Companies—When essential.*

A creditor was given possession of the items of moveables pledged to him and it was provided that as and when other moveable properties come into his possession, they also stand pledged to him. The security itself was expressly stated to be a continuing one. On default of payment when demanded he was given the right to have the properties in his possession sold by public or private auction and apply the net proceeds in liquidation of the amounts due to him. Though the debtor company was allowed to run its business, it was only run by the creditor as an agent under an irrevocable power of attorney. In the circumstances,

Held, that it cannot be said that this is a mere floating charge coming under clause (*f*) of section 109 of the Companies Act and non-registration of the deed cannot invalidate the security. The element of possession, which is contemplated by the deed and which was actually given, is an important factor, which stands in the way of the document being regarded as creating a purely equitable charge of a character coming fairly within the description of a floating charge requiring registration. I.L.R. 54 Cal. 503 and I.L.R. 50 Bom. 547, referred to.

K. Narasimha Aiyar for *C. R. Krishna Rao* and *D. B. Jagannadha Rao* for Appellant.

V. Radhakrishnayya for *Messrs. Short Bewes & Co.* for Respondent.

K.S. ——— *Application allowed.*

Rajagopalan, J.
3rd March, 1949.

Venkataperumal Naidu *v.* Ratnasabapathy Chettiar.
S. A. No. 800 of 1946.

Civil Procedure Code (*V of* 1908), *Order* 34, *rule* 1 *and Order* 1, *rule* 9—*Suit by vendee from mortgagor for redemption—Vendor, if necessary party—Non-joinder of vendor—Effect.*

Whether a person is a necessary party to a suit for redemption will have to be decided with reference to the circumstances of each case. It is not an universal rule that in every case the mortgagor or the vendor of the mortgaged property would be a necessary party in the vendee's redemption suit. If such a person has a right to defend the suit he will be a necessary party. The vendor having his vendor's lien that would make him a person interested in the property and a necessary party within the meaning of Order 34, rule 1 of the Civil Procedure Code. But the failure to add all the parties interested in the property to be redeemed is no bar to the grant of the relief claimed if it can be granted without touching the rights of the other persons or even the rights of the defendants against those persons.

M. S. Vaidyanatha Aiyar for Appellant.

V. Seshadri and *K. S. Ramamurthi* for Respondent.

K.S. ——— *Appeal dismissed. Leave granted.*

Rajamannar, C.J. and Raghava Rao, J.
4th March, 1949.

Mahalakshmi Textiles, Ltd. *v.* Meyyappa Chettiar.
Appeal No. 505 of 1945.

Companies—Forfeiture of shares for non-payment of call money—Resolution if should specify person to whom or the place at which call money was to be paid.

It is not necessary that the persons to whom and the place at which the call is to be paid should be mentioned in the resolution making the call though these matters must be fixed by the board as required by the articles of association.

In the absence of any evidence upon the point the Court is entitled to assume that notices of call were sent out by the agents of the company with the sanction of the directors and that the directors had in fact appointed the persons to whom and the place at which the call is to be paid.

I.L.R. 57 Bom. 413, followed; I.L.R. 20 Lah. 1, distinguished; I.L.R. (1942) 1 Cal. 132, dissented from.

A forfeiture of shares for non-payment of such call money is neither illegal nor irregular.

A. Krishnaswami Aiyar, *K. Subramaniyam* and *Alladi Kuppuswami* for Appellant.

S. Venkatesa Aiyangar for Respondents.

K.S. ——— *Appeal allowed.*

Rajagopalan, J.
9th March, 1949.

Sayed Hameed, *In re*.
Cr. R. C. Nos. 388, etc., of 1947.
(Cr. R. P. Nos. 374, etc., of 1947).

Defence of India Rules, rule 90-B—Validity of—If in conflict with Defence of India Act, section 2 (2), clause 26—Contravention of rule—Offence—Complaint of by Customs Collector though not subscribing himself as such—Sufficiency to enable Magistrate to take cognizance of the offence.

Rule 90-B of the Defence of India Rules is *intra vires* the rule-making authority. There was no conflict between rule 90-B and the clause 26 [as amended by Defence of India (Second Amendment) Ordinance, 1944, with retrospective effect] of sub-section (2) of section 2 of the Defence of India Act.

Reference to section 19 of Sea Customs Act in rule 90-B did not limit the rule-making power conferred upon the Government under section 2 of the Defence of India Act to the penalties prescribed by the Sea Customs Act itself. A contravention of rule 90-B becomes punishable by a Magistrate and the Magistrate can take cognizance of the commission of the offence only when there is a complaint before him by a Customs Collector. But the fact that such a Collector did not subscribe himself in the complaint as Customs Collector in no way affects the validiy of the complaint as a complaint by a Customs Collector within the meaning of the proviso to rule 90-B. " Customs Collector " for the purpose of deciding that penalties provided under the Sea Customs Act were inadequate and for filing a complaint under rule 90-B will include an Inspector of Customs though he may not have the power to impose the penalties under the Sea Customs Act.

T. R. Venkatarama Sastriar, *V. V. Srinivasa Iyengar*, *V. V. Ramadurai*, *T. V. Rajagopalan*, *N. Ramaswami Aiyangar*, *V. V. Radhakrishnan*, *C. K. Venkatanarasimhan* and *V. Sundaresan* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

N. R. Raghavachariar, *V. Rajagopalachariar* and *V. Somasundaram* for Respondents (Accused 11 to 14) in Criminal Appeal No. 552 of 1947.

K.S. ——— *Petitions and appeal dismissed.*

Subba Rao and Panchapakesa Ayyar, JJ. Suryaprakasa Rao *v.* Satyanarayana Sarma.
10th March, 1949. Appeal No. 52 of 1946.

Madras Agriculturists Relief Act (IV of 1938), *section* 9, *proviso—Scope—Debts in renewal of prior debts arising after* 1*st October,* 1932*—Ascertainment of principal—Proper procedure.*

There is nothing in the proviso to section 9 of Madras Act IV of 1938 to show that section 9 does not seem to contemplate any going back to any earlier debt except for the single purpose of ascertaining what is the theoretical date of the debt in order to find out whether it has to be scaled down under section 8 or not. Nor can it be said that there is no machinery under section 9 for scaling down debts arising after 1st October, 1932, except on the basis of the actual contract sued on with such re-appropriation of payments towards interest as are expressly prescribed. Under the proviso to section 9, any part of the debt which is found to be a renewal of the prior debt shall be deemed to be a debt contracted on the date on which such prior debt was incurred and therefore the principal amount will be in such a case only the principal amount advanced originally and any further sums advanced as principal, even if section 9 alone applied and this will not be the case if only section 8 applied.

Where a suit on a promissory note was filed for the full amount due after the Federal Court's decision, that Act IV of 1938 was *ultra vires* as regards its application to promissory notes and before the Governor-General's Ordinance validating the same, the plaintiff must be given the full costs on the original amount claimed and not on the scaled down amount decreed after the ordinance.

P. Somasundaram and *P. Suryanarayana* for Appellant.

Devaguptapu Satyanarayana Sarma for Respondent.

K.S. *Decree modified as regards costs.*

Subba Rao, J. Kunhamutty *v.* Bavutty.
11*th March,* 1949. C. R. P. No. 153 of 1948.

Madras Tenants and Ryots Protection Act (XVII of 1946), *section* 4 (2) (i) *and* (5) *—Construction—Arrears of rent—Amounts payable.*

In the case of suits filed prior to the commencement of Act XVII of 1946, sub-section (2) of section 4 gives an option to the tenant either to pay the entire arrears of rent that fell due prior to the commencement of the Act or two years' rent, whichever is less. It is an option given for the benefit of the tenant.

When the arrears subsequent to the Act fall due the tenant has got to pay them within the time prescribed.

K. P. Ramakrishna Iyer for Petitioner.

D. A. Krishna Variar for Respondent.

K.S. *Petition dismissed.*

Subba Rao, J. Ramunni Variar *v.* Narayannai Varasiyar.
11*th March,* 1949. C. R. P. Nos. 3 and 4 of 1948.

Madras Tenants and Ryots Protection Act (XVII of 1946), *section* 4 (5)*—Power to grant "further" time—If can be beyond* 4 *months from the date rent accrued due or otherwise than in continuation of prior period.*

Sub-section (5) of section 4 of Madras Act XVII of 1946 does not in express terms confine the jurisdiction of a Court to extend time for the payment of rent only up to a continuous period of four months (where a suit has been stayed). The use of the words "further period" in the sub-section does not necessarily show that the additional period should be in continuation of the prior period. The fact that the Legislature instead of using the word "extend" [as in sub-section (4)] used the expression "further" in sub-section (5) shows that the power is not to extend but grant time which can be done at any time when the Court is asked to exercise the discretion.

Observations of Panchapakesa Ayyar, in C. R. P. No. 1469 of 1947, treated as *obiter* and not followed.

A. Achuthan Nambiar for Petitioner.

D. A. Krishna Variar for Respondent.

K.S. ——— *Order set aside and matter remanded.*

Somasundaram, J. Srinivasa Nadar, *In re.*
14*th March*, 1949. Cr. M. P. No. 2450 of 1948.

Criminal Procedure Code (V of 1898), *section* 523 *and Madras Police Standing Orders, Order* 669—*Police seizing from accused's possession buffalo suspected to be stolen and handing it over to complainant who identified it as hers under Standing Order* 669—*Accused given the benefit of doubt and acquitted—Death of buffalo while in complainant's custody—Value of buffalo—If can be ordered to be paid by complainant to accused by criminal Court.*

When a person is charged with theft and if he claims the property as his and ultimately he is acquitted, though by the benefit of a doubt, the normal rule is that the property should be returned to the person from whom it was taken. Where instead of reporting the seizure, of a buffalo suspected to be stolen, as required by section 523 of the Criminal Procedure Code to a Magistrate and taking his orders, the police apparently acting under Order 669 of the Madras Police Standing Orders handed over the buffalo to the complainant who identified it as hers and pending the disposal of the case the buffalo died a natural death, but ultimately the accused who was acquitted claimed the value of the buffalo from the complainant,

Held, in the absence of a bond from the complainant as security for the property handed over to her, there is no provision under which the Criminal Court can force her to pay the value particularly when the buffalo had died a natural death.

The accused may seek his remedies in the Civil Court.

M. S. Varadacharya for Petitioner.

The Crown Prosecutor (*S. Govind Swaminathan*) on behalf of the Crown.

K.S. ——— *Petition dismissed.*

Mack, J. Seshachariar *v.* Pattammal.
14*th March*, 1949. C. R. P. No. 242 of 1948.

Court-Fees Act (VII of 1870), *section* 7 (iv) (c)—*Suit for declaration of plaintiffs's right to a fourth share in* mirasi *office—Valuation for jurisdiction at certain amount—Court-fee is payable* ad valorem *on same valuation for the consequential reliefs.*

In a suit for a declaration of his right to a fourth share in a *mirasi* office in a temple as cook entitled to certain emoluments and perquisites the plaintiff valued the suit for purposes of jurisdiction at Rs. 3,100 and paid for the declaration, he sought court-fee of Rs. 100 under Article 17-B of Schedule II of the Court-Fees Act. He asked for consequential reliefs, for injunction to the temple committee to cancel certain orders and to permit him to perform his duties and enjoy the emoluments. He valued this relief at Rs. 100 and paid a court-fee of Rs. 11-3-0.

Held as the plaintiff has taken upon himself to value the office which he substantially seeks to recover at Rs. 3,100, he cannot be heard to say that he can value his relief for purposes of jurisdiction at Rs. 3,100 and then that for purposes of consequential relief, the value of his suit is incapable of valuation to evade court-fee on this ground by valuing it at Rs. 100. Article 17-B does not apply and *ad valorem* court-fee is payable.

B. C. Seshachala Aiyar for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for the Government.

D. Ramaswami Aiyangar and *W. Krishnaswami Naidu* for Respondents.

K.S. —————— *Petition dismissed.*

Somasundaram, J.
16th March, 1949.

Subba Rao, *In re.*
Cr.R.C. No. 546 of 1948.
(Cr. R.P. No. 514 of 1948).

Prevention of Corruption Act (II of 1947)—*Sanction to prosecute—Essentials for validity of.*

Where the sanction to prosecute on the face of it does not contain the facts constituting the offence charged nor was there any evidence given that those facts were placed before the sanctioning authority the sanction will not be valid and cannot confer jurisdiction to the Court to take cognisance of the offence.

(1948) 1 M.L.J. 243 (P.C.), followed.

C. A. Vaidyalingam and *K. Ramachandra Rao* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. —————— *Conviction set aside.*

Govinda Menon, J.
17th March, 1949.

Bhimavva *v.* Nagappa.
S. A. No. 897 of 1946.

Civil Procedure Code (V of 1908), *Order* 21, *rules* 63 *and* 103—*Distinction between what has to be proved in suits under.*

There is one distinction between what has to be proved in a suit under Order 21, rule 63, and that in a suit under Order 21, rule 103 of the Civil Procedure Code. So far as the class of suits contemplated by the latter provision are concerned, the Code lays down affirmatively that the plaintiff should prove his title. So far as suits under Order 21, rule 63 are concerned all that the Code requires is that the plaintiff should prove right to possession. This distinction is not often kept in view by the Courts. The question of title is not intended to be so elaborately

gone into in a case under Order 21, rule 63, as in a case under Order 21, rule 103 of the Code.

P. Chenchiah for *V. S. Narasimhachar* for Appellant.

C. Vasudevan for Respondents.

K.S. ——— *Appeal dismissed. Leave refused.*

Satyanarayana Rao and Viswanatha Sastri, JJ.
17th March, 1949.

Mani & Sons, Ltd. *v.* The Official Assignee, Madras.

O. S. A. No. 11 of 1948.

Presidency Towns Insolvency Act (III of 1909), section 52 (2) (c)—Reputed ownership—Doctrine of, how far applicable to commission agents in possession of goods of others for sale.

Where the insolvent who was a dealer in cattle food is found to have stocked both in his business premises as well as in the godowns a large number of rice bran bags (goods of a kind in which he was trading) people who came into contact with the insolvent in the way of his business as well as people who were having dealings with him would have presumed that he was the owner of the goods found in his premises and therefore the case comes within section 52 (2) (*c*) of the Presidency Towns Insolvency Act, though he might have stocked the goods only as a commission agent.

153 E.R. 1195 ; (1904) 2 Ch. 753 ; (1923) 2 Ch. 89 and I.L.R. 5 Rang. 73, discussed.

J. S. Vedamanickam for Appellant.

N. T. Raghunathan for 1st Respondent.

K.S. ——— *Appeal dismissed.*

Satyanarayana Rao and Viswanatha Sastri, JJ.
18th March, 1949.

Vajravelu Mudaliar *v.* Commissioner of Police, Madras.

Cr. M. P. Nos. 432 and 433 of 1949.

Extradition—Indian Dependencies of France—Accused in criminal cases pending in French territory—Extradition—Procedure—Indian Extradition Act does not apply.

The Indian Extradition Act does not apply to the East Indian Dependencies of France and extradition in East Indian possessions of Great Britain and France are governed by Article IX of the Treaty of 7th March, 1815, entered into between the British Government and the French Government. No particular procedure is laid down by this Article IX as to the manner or the mode of arrest of persons wanted by the French Indian authorities but that does not make the procedure under the Extradition Act applicable. The treaty practically provides for surrender on demand and a more elaborate procedure cannot be superimposed by the unilateral Act of one of the parties.

The Chief Presidency Magistrate, Madras, on receipt of a request from the Consul General, French India, is not bound to follow the procedure laid down in section 7 of Chapter III of the Indian Extradition Act. There is nothing illegal therefore in producing the arrested persons before the Commissioner of Police instead of before the Presidency Magistrate as required by the Extradition Act. The detention of the arrested persons cannot therefore be said to be illegal or improper as so to attract the provisions of section 491, Criminal Procedure Code.

I.L.R. 53 Mad. 1023, followed.

A. Nagarajan and *A. Viswanathan* for Petitioner.

The Crown Prosecutor (*S. Govind Swaminathan*) for the Crown.

K.S. ——— *Applications dismissed.*

Mack, J. Kshatriya Sandarare Nadar Uravinmurai *v.* Manikkam.

7th March, 1949. C. R. P. No. 421 of 1948.

Court-Fees Act (VII of 1870), *section* 7, *clause* (v) (b)—*Suit for recovery of house site with valuable buildings standing on it—Cannot be valued as one for ordinary land.*

Where in a prior suit the same property was valued as (*natham*) house sites in a village and valuable buildings were found to exist and the plaint was returned as beyond the pecuniary jurisdiction, the plaintiff cannot file a fresh suit valuing the sites as ordinary lands in the village under section 7, clause (v) (*b*) of the Court-Fees Act. Court-fee must be paid on the market value of the site including the buildings thereon. The plaintiff should not be permitted to twist the language of his plaint in such a manner for the purpose of evading court-fee.

U. S. Ramaswami Aiyar for Petitioner.

T. S. Vaidyanatha Aiyar for Respondent.

K.S. ——— *Petition allowed.*

Rajagopalan, J. Narayanaswami Ayyar *v.* Muthurathnam Ayyar.

7th March, 1949. S. A. No. 836 of 1946.

Transfer of Property Act (IV of 1882), *sections* 119 (*before its amendment in* 1929), 120 *and* 55 (2)—*Scope—Purchaser from one of the parties to an exchange—Not entitled to enforce statutory right to recover the property exchanged on being dispossessed of the property.*

A purchaser from one of the parties to an exchange who is dispossessed of the property by a person who claimed a superior title is not entitled to recover the property exchanged as he was not himself a party to the exchange. In the absence of any specific provision in the contract of exchange he cannot claim any contractual right either. The specific right conferred by section 119 of the Transfer of Property Act as it stood before 1929 no doubt carried with it a liability which could be imposed on the other side; but that liability which was implied is not co-extensive with the right created by section 119. That the liability could be transferred and be enforced against an assignee from a party to a contract of exchange does not necessarily imply that the assignee from a party who seeks to enforce the right to recover the property can despite the plain words of section 119, claim such a right. The statutory right of buyer and seller created by section 55 (2) of the Transfer of Property Act is outside the scope of section 119 of the Transfer of Property Act. Section 120 of the Transfer of Property Act cannot be construed to confer on an assignee of the "party" within the meaning of section 119 rights which section 119 conferred on that party.

(1940) 1 M.L.J. 248 and I.L.R. 42 Mad. 690, distinguished.

N. R. Govindachari and *N. K. Karpaga Vinayagam* for Appellant.

K. G. Srinivasa Aiyar for Respondent.

K.S. ——— *Appeal allowed. Leave refused.*

Yahya Ali and Govinda Menon, JJ. Merchant *v.* The Bank of Mysore, Ltd.

9th March, 1949. L. P. A. No. 5 of 1949.

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *section* 7—*Case falling within the purview of—Not governed by section* 111 *of the Transfer of Property Act (IV of* 1882)—*Question of want of notice to quit—If can be agitated before executing Court.*

When a case falls within the purview of section 7 of Madras Act XV of 1946, it is entirely governed by that section and not by section 111 of the Transfer of Property Act.

A plea that notice to quit was essential ought to have been raised as a matter of pleading and a Court executing an order for eviction cannot entertain the plea. The question of want of notice to quit does not raise a question of jurisdiction which

may be said to be one going to the root of the matter and as such falling to be agitated at the stage of execution. It could not even be raised for the first time in appeal being a mixed question of law and fact.

(1949) 1 M.L.J. 417, affirmed.

V. V. Srinivasa Aiyangar and *A. Nagarajan* for Appellant.

N. Parthasarathy for Respondent.

K. S. ——— *Appeal dismissed.*

Horwill and Raghava Rao, JJ. Visalakshi Ammal *v.* Alamelu Achi.

11th March, 1949. Appeal No. 48 of 1946.

Civil Procedure Code (V of 1908), *Order* 21, *rule* 24 (2)—*Requirements—Attachment warrant, sale proclamation and sale warrant signed by Deputy Nazir of District Court—Oral authorization through Sheristadar—Sufficiency—Seal of District Court as prescribed but having in addition word "Nazarat" affixed to the warrants—If renders the execution sale void.*

Where in pursuance of the Process Service Rules, rule 3, the Sheristadar of a District Court had instructed the Deputy Nazir to send all arrest warrants to him for signature and to continue signing the other warrants and processes himself, it is reasonable to conclude that the District Judge had acted on the circular issued by the High Court and must have instructed the Deputy Nazir through the Sheristadar to sign all processes other than arrest warrants. Where the attachment warrant, proclamation and sale warrants are signed by such Deputy Nazir it cannot be said that he was not duly authorised. Nor can it be said that the documents were not stamped with the Court seal merely because there is in addition the word "Nazarat." in the seal which conforms to the prescribed specifications.

V. Ramaswami Aiyar for Appellant.

A. Sundaram Aiyar for Respondent.

K.S. ——— *Appeals dismissed.*

Govinda Menon, J. Narasamma *v.* Rana Naidu.

16th March, 1949. A. A. O. No. 135 of 1947.

Lunacy Act (IV of 1912), *sections* 40, 41 *and* 42—*Duty of Court to be* prima facie *satisfied that alleged person was of unsound mind before ordering inquisition.*

An order directing an inquisition into a man's state of mind is a very serious thing and such an order is intended by the statute to be a judicial determination carefully made upon adequate materials.

I.L.R. 54 Cal. 836 ; I.L.R. 42 All. 504 and A.I.R. 1930 Lah. 289, referred to.

Where the judge is satisfied on the affidavits and documents filed by consent that a person is of unsound mind there is nothing wrong in ordering the production of the lunatic and directing his examination by the Medical Officer and adjudge him a lunatic on the strength of the medical report.

T. Venkatadri for Appellant.

K. Umamaheswaram for Respondents.

K.S. ——— *Appeal dismissed.*

Panchapakesa Ayyar, J. Official Receiver, West Tanjore *v.* Sakkuwarbai Ammal.

18th March, 1949. A. A. A. O. No. 288 of 1945.

Madras Estates Land Act (I of 1908)—*Landlord obtaining decree against a tenant afterwards ceasing to be his landlord—If can execute the decree in a revenue Court and realise his arrears in a revenue sale.*

A landholder who had obtained a decree against a tenant, under the Madras Estates Land Act, but has afterwards ceased to be his landholder, and the relationship between the landholder and tenant has ceased to exist, cannot execute the

decree in a *revenue* Court and realise his arrears in a revenue sale (which will be free of all encumbrances) and should execute it in Civil Court.

I.L.R. 39 Mad. 1018; I.L.R. 43 Mad. 786; I.L.R. 55 Mad. 468 and 37 L.W. 655, relied on.

Observations of Sadasiva Aiyar, J., in I.L.R. 44 Mad. 433, treated as *obiter* and not followed.

The policy of the Madras Estates Land Act is to give the landholder who is the present landholder in respect of the holding and ryot preference regarding the recovery of his rent free from all encumbrances and charges for arrears.

The amendments of sections 125 and 127 of the Madras Estates Land Act have not affected the position.

T. K. Subramaniam Pillai for Appellant.

G. R. Jagadisan for Respondent.

K.S. ——— *Appeal dismissed. Leave granted.*

Satyanarayana Rao and Viswanatha Sastri, JJ. Prabhakara Reddy, *In re.*
21st March, 1949. Cr. M. P. No. 2461 of 1948.

Madras Maintenance of Public Order Act (I of 1947); *section* 2 (1) (a)—*Grounds of detention within purview of Act combined with grounds outside the purview of the Act —Effect—Continuance of detention cannot be justified.*

If grounds within the purview of the Act are combined with grounds outside its purview the continuance of detention cannot be justified as it would be impossible to know which of the grounds really influenced the judgment of the detaining authority in coming to the conclusion that an order under section 2 (1) of Madras Act I of 1947 should be passed restraining the liberty of the person concerned. [Decision in Crl. M. P. No. 190 of 1949, followed.]

S. Obul Reddy for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ——— *Petition allowed.*

Satyanarayana Rao and Viswanatha Sastri, JJ. Kommaran, *In re.*
21st March, 1949. Cr. M. P. No. 194 of 1949.

Madras Maintenance of Public Order Act (I of 1947)—*Order for detention not specifying place of detention—If renders detention illegal.*

Where the grounds of detention disclosed that the person ordered to be detained was screening communists whom the Government wanted to arrest and that he was also one of the members of the Taluk Committee who followed a programme of dacoity, armed conflict with authorities, etc., the ground is specific enough and justified the continuance of detention. The fact that the place of detention is not indicated in the order does not render the order illegal. The section only requires that the order should direct the person to be detained and does not require the place of detention also to be mentioned.

N. S. Mani for *Messrs. Row and Reddy* for Petitioner.

N. T. Raghunathan for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ——— *Petition dismissed.*

Mack, J. China Varahalu *v.* Reddayya.
21st March, 1949. C. R. P. No. 1677 of 1947.

Civil Procedure Code (V of 1908), *section* 151—*Inherent power to order refund af court-fee even where there are no specific provisions for the purpose.*

The petitioner filed a suit against his own father for recovery of about Rs. 3,000. He paid a court-fee of Re. 0-12-0 on his plaint and was given on 13th September,

1946, seven days' time for payment of deficit court-fee. He re-presented the plaint only on 7th November, 1946, accompanied by an application for condonation of the delay in re-presentation and also with deficit court-fee of Rs. 276-11-0. The application for condonation of delay was dismissed and on an application for refund of court-fee under section 151 of the Code of Civil Procedure,

Held, in a case of this kind where no specific provision is made for the refund of court-fee section 151 of the Code of Civil Procedure can be invoked to meet the ends of justice. The petitioner tendered the court-fee only on the basis that his application for condonation of the delay would be admitted. As such application however was rejected the court-fee tendered should be refunded on equitable principles.

(1942) 1 M.L.J. 226, relied on.

K. B. Krishnamurthi for Petitioner.

Respondent not represented.

K.S. ——— *Petition allowed.*

Mack, J. Chathan *v.* Cheeru.

22nd March, 1949. C. R. P. No. 1679 of 1947.

Partition Act (IV of 1893), *sections* 2 *and* 6—*Decree for partition of a very small house and garden incapable of equitable and practicable division—Proper course.*

Where there is a decree for partition of a very small house and garden incapable of any equitable or practicable partition into two shares, section 2 of the Partition Act should be applied and the executing Court should direct a sale of the entire property and a distribution of the sale proceeds amongst the sharers. It is regrettable that section 2 of the Partition Act is so frequently ignored by executing Courts in seeking to give effect to family partition decrees and in trying to fragment land and houses into impracticable, impossible and uneconomic fragments.

A. Achuthan Nambiar for Petitioner.

V. P. Gopalan Nambiar for Respondent.

K.S. ——— *Petition allowed.*

Satyanarayana Rao and Viswanatha Sastri, JJ. Sambandam, *In re.*

29th March, 1949. Cr. M. P. No. 282 of 1949.

Madras Maintenance of Public Order Act (I of 1947), *sections* 2 (1) (a), 3 (5) *and* 4 (2)—*Detaining authority not applying his mind to fact whether the person concerned was acting or was about to act in a manner prejudicial to public safety—Effect—Order illegal at inception—If rendered legal by the fact of Government confirming it under section* 3 (5) *or extending the period of detention under section* 4 (2) *of the Act.*

The satisfaction of the detaining authority that the person concerned was acting or was about to act in a manner prejudicial to public safety or the maintenance of public order is a condition precedent for making an order of detention under section 2 (1) of the Madras Maintenance of Public Order Act, 1947. It is not sufficient to say "I am satisfied that with a view to preventing *S* (the person sought to be detained) from acting in a manner prejudicial to the maintenance of Public Order it is necessary to detain him." An order for detention in pursuance of such satisfaction is illegal. The fact that the Government confirmed that order under section 3 (5) of the Act or the fact that they extended the period of detention after further consideration under section 4 (2) of the Act would not make the detention which was at its inception illegal, legal.

N. S. Mani for *Messrs. Rao* and *Reddy* for Petitioner.

N. T. Raghunathan for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ——— *Petition allowed.*

Rajamannar, C.J. and Balakrishna Ayyar, J. Karuppayee Ammal *v.* Periasami Goundan.
1st March, 1949. Appeal No. 525 of 1945.

Court-Fees Act (VII of 1870), section 7 (iv) (c) and Madras Provisio—Suit praying for declaration that plaintiff was entitled to suit properties and for permanent injunction restraining defendants from interfering with plaintiff's possession—Prayer for injunction if consequential relief to the prayer for declaration.

It is difficult to lay down a general rule to find out when a relief can be said to be consequential on another relief. 51 M.L.J. 67 referred to. Where defendants began to assert their title to the suit properties and some days later attempted to trespass into the lands and the plaintiff filed a suit for a declaration that he was entitled to the suit properties and for a permanent injunction restraining the defendants from interfering with the plaintiff's possession it cannot be said that the suit should be valued as one falling under section 7 (*iv*) (*c*) read with Madras Proviso in which a consequential relief is prayed for. The injunction prayed for cannot be treated as a consequential relief in the circumstances as both the reliefs for declaration and injunction were not founded on the same set of facts.

Accordingly a Court-fee of Rs. 100 under Article 17 (A) (1) of Schedule II of the Court-Fees Act for the relief of declaration of title valuing the properties at Rs. 5,200 and an *ad valorem* Court-fee of Rs. 50-10-0 being half of ten times the kist for the relief of injunction are sufficient.

T. V. Muthukrishna Ayyar and *S. Ramachandra Iyer* for the Appellant.

R. Viswanatha Ayyar for *R. Desikan* for the respondent.

The Government Pleader (*K. Kuttikrishna Menon*) on behalf of the Government.

K.S. ——— *Appeal allowed.*

Panchapakesa Ayyar, J. Venkataramana Rao *v.* Suryanarayana.
11th March, 1949. A.A.A.O. No. 150 of 1947.

Madras Agriculturists Relief Act (IV of 1938), section 8, Explanation 1 as amended by Act XXIII of 1948—Mandatory nature and effect—General endorsement of payment "towards principal and interest" can be appropriated towards principal only—Amendment is retrospective.

The amendments made by Madras Act XXIII of 1948 are retrospective and applicable to all decrees or orders which have not become final. The provisions of Explanation 1 to section 8 of Madras Act IV of 1938 are mandatory and must be construed strictly. A general endorsement "towards principal and interest" will no longer be of any benefit to the creditor and there must be an express and specific endorsement that the payment shall be in reduction of interest, without mentioning anything about the principal. When a lump sum is paid "towards principal and interest" it has now to be credited *only to the principal.*

A mere general phrase in a renewed promissory note like "taking into account payments already made" will certainly not satisfy the requirements of section 8, Explanation 1 so as to make the open payments so far made payments towards interest. Section 8 (4) will not apply to a mere re-adjustment where there is no real refund by creditor but only a lessening of the sum due to him under the debt.

K. Kameswara Rao and *N. Ramamohan Rao* for Appellant.

C. Rama Rao for Respondent.

K.S. ——— *Appeal allowed. Leave granted.*

N R C

Rajagopalan, J. Narayanan *v.* District Board, Salem.
15th March, 1949. S.A. No. 877 of 1946.

Madras Local Boards Act (*XIV of* 1920), *section* 225 (2)—*Limitation under—Applicability—Tests—Employment under a contract as medical officer in charge of a rural dispensary—Claim for wrongful dismissal—Claim for damages—If to be brought within six months of arising of cause of action.*

Where a contract is entered into in the direct exercise of a statutory power by the President of a District Board it would come within the scope of section 225 of the Madras Local Boards Act. But where the contract is only incidental to the exercise of the statutory power, the claim based upon such a contract will not be hit by the special statutory restrictions embodied in section 225 of the Act. The appointment of a person as a medical officer to be in charge of a rural dispensary by a contract incidental to the statutory powers of the Local Board to maintain dispensaries under Schedule V, rule 1 (A) (*h*) of the Local Boards Act and a claim by the medical officer for damages for wrongful dismisal will not be barred under section 225 of the Local Boards Act as the special six months period of limitation under that section will not apply.

68 M.L.J. 125 : 58 Mad. 746 explained.

A.I.R. 1936 Mad. 945 ; A.I.R. 1938 Mad. 239 ; 57 Bom. 67 ; 2 Mad. 124 and 28 M.L.J. 147 relied on.

A.I.R. 1941 Mad. 733 distinguished.

V. S. Rangaswami Aiyangar for Appellant.

Basheer Ahmed Sayeed for Respondent.

K.S. *Appeal allowed.*

Rajagopalan, J. Atchutan Nair *v.* Gopalan Nair.
16th March, 1949. A.A.A.O. No. 109 of 1947.

Civil Procedure Code (*V of* 1908), *section* 144—*Restitution—Mesne Profits—When recoverable.*

Apart from the question of restitution, when the material on record does not establish that the possession obtained by the plaintiff decree-holder was unlawful the defendant cannot claim any mesne profits. Where the decree debt is subsequently scaled down under Madras Act IV of 1938 thereby reducing the liability it cannot be said that possession of the decree-holder purchaser obtained in a sale in execution for the original amount of the decree was unlawful entitling the defendant to claim mesne profits.

1945 1 M.L.J. 480 applied.

I.L.R. 43 Bom. 235 distinguished.

D. H. Nambudripad for Appellant.

K. Kuttikrishna Menon for Respondent.

K.S. *Appeal dismissed. Leave refused.*

Rajagopalan, J. Sastri Ammal *v.* Arunachalam Chettiar.
16th March, 1949. A.A.A.O. No. 231 of 1947.

Madras Agriculturists Relief Act (*IV of* 1938), *section* 19—*Requirements to enable a debtor to apply under—Should be "agriculturist" on date of application also.*

The object of Madras Act Act IV of 1938 is clearly to provide relief for debtors who are agriculturists at the commencement of the Act. Section 19 read with the definition of "agriculturist" requires that the debtor seeking relief should be an "agriculturist" at the time of the application and the debtor should also have been

an agriculturist on the 1st October, 1937, as the proposal of affording relief to indebted agriculturists was made known on that date.

K. V. Ramachandra Aiyar for Appellant.

T. K. Subramania Pillai for *A. C. Sampath Aiyangar* for Respondent.

K.S. — *Appeal remanded.*

Rajamannar, C.J. and Balakrishna Ayyar, J. Raju Chettiar and Brothers *v.* Commissioner of Income-tax, Madras.
21st March, 1949. C.M.P. No. 1371 of 1949.

Federal Court Enlargement of Jurisdiction Act (I of 1948)*—Judgment delivered on a reference made under section* 66 *of the Indian Income-tax Act—Appeal to Federal Court—If lies.*

A judgment of the High Court delivered on a reference made under section 66 of the Indian Income-tax Act is one from which a direct appeal to the Privy Council could have been brought. An appeal will therefore lie against such a judgment to the Federal Court under the provisions of Act I of 1948.

47 Bom. 724 (P.C.) distinguished.

K. S. Ramamurthi for the Advocate-General *and K. Srinivasan* for the Petitioner.

C. S. Rama Rao Sahib for the Respondent.

K.S. — *Application granted.*

Mack, J. Narayana Rao *v.* Official Receiver, Rajahmundry.
21st March, 1949. C.R.P. No. 1422 of 1947.

Provincial Insolvency Act (V of 1920)*, sections* 53 *and* 67*—Appeal against order under section* 53 *setting aside alienation—Alienee entering into compromise agreeing to deposit sufficient money to pay off the creditors and expenses—Balance left after disbursements from deposit—Alienee has more equitable right to it than insolvent.*

Where pending an appeal against an order under section 53 of the Provincial Insolvency Act setting aside an alienation by the debtor, the alienee entered into a compromise agreeing to deposit enough money to pay off all the debts and makes a deposit, the alienee rather than the debtor has a more equitable right to the balance remaining out of his deposit after payment of all the debts.

T. R. Srinivasan and *S. Gopalaratnam* for Petitioner.

V. Viyyanna for Respondent.

K.S. — *Petition allowed.*

Horwill and Raghava Rao, JJ. Nagamma Shedthi *v.* Korathi Hensu.
23rd March, 1949. Appeal No. 42 of 1946.

Aliyasanthana family—Decree obtained against kartha—Cannot be held to be not binding on junior members merely on the ground of gross neglect or breach of duty on the part of the Kartha—Civil Procedure Code (V of 1908)*, section* 11*—Explanation VI.*

A decree obtained against the karnavan of a Malabar tarwad or the Kartha of an Aliyasanthana family cannot be held to be not binding on the junior members merely on ground of gross negligence or breach duty on the part of the karnavan or kartha as such neglect or breach of duty cannot be treated as tantamount to fraud on the power of representation vested in him.

The principle governing the situation is to be found in Explanation VI to section 11 of the Civil Procedure Code.

I.L.R. 7 Mad. 413 and 10 Mad. 322 held to have been overruled by 20 Mad. 129 (F.B.).

71 M.L.J. 545 dissented from.

B. Lakkappa Rai for Appellant.

K. Y. Adiya, K.P. Adiga, B. Venkatakrishnayya and *Santosh* for Respondents.

K.S. — *Appeal allowed.*

Panchapakesa Aiyar, J. Velu Pillai *v.* Soundararajulu Naidu.
25th March, 1949. A.A.A. O. No. 73 of 1948.

Civil Procedure Code (*V of* 1908), *section* 48—*Execution petition returned as decree did not provide for subsequent interest from date of decree as claimed in execution—Delay in re-presentation excused subject to the question of limitation—Delay in re-presentation if can be re-agitated—Amendment of decree* (*providing for future interest*) *after twelve years from date of decree—Execution if barred under section* 48 *of the Code.*

The assignee from the original decree-holder filed a number of execution petitions, the last of which was filed on 29th March, 1945 (before the expiry of twelve years from the date of the decree). Assuming that interest after the decree had been granted he claimed in the execution petition *inter alia* a certain amount as interest at six per cent. per annum after the decree. The Court returned the petition after more than one month with the remarks "the decree does not provide for subsequent interest. This petition may be re-presented after amendment of decree is allowed. Returned. Time till 11th June, 1945." The petition was re-presented on 11th June, 1945 with the endorsement "application filed on the trial side to amend the decree. After it is ordered I shall add subsequent interest." The Court returned it on 14th June, 1945 with the remarks "petition is returned for re-presentation with the amended decree. Time two weeks." The amendment petition went on for months and the assignee decree-holder, finding no prospects of getting the amended decree soon, re-presented the execution petition on 3rd December, 1945 with a petition to excuse the delay in re-presentation. On 10th December, 1945, the Munsiff ordered "Delay excused subject to the question of limitation". On 3rd November, 1945 the twelve years period under section 48 of the Code of Civil Procedure had elapsed. The decree was amended on 26th March, 1946 allowing interest which had been omitted by oversight. The sale papers and a copy of the amended decree were filed in Court on 10th April, 1946 when the Court numbered the execution petition and proceeded with the same and dismissed the same as barred by limitation under section 48, Civil Procedure Code. On appeal it was held that the execution petition must be deemed to have been filed on 29th March, 1945, and therefore in time. On further appeal: *Held* (*i*) The correct view of the order excusing the delay in re-presentation is that the District Munsiff excused the delay in re-presentation and allowed any other question of limitation (for example limitation regarding the amounts claimed under the amended decree, or perhaps the execution petition filed on 29th March, 1945 was barred by limitation by that date) to be argued, if deemed fit. It cannot be that he intended that the delay in re-presentation he excused after notice to the judgment-debtor should be again agitated under the pretence of arguing a point of limitation. (*ii*) Even if the order excusing delay was made *ex parte* unless the other party objects to it as soon as he comes on record and the matter is re-opened, the order must be taken to be final and binding on all parties. (*iii*) An amended decree is not a separate and different decree, but is merged with the original decree and is only the original decree in a new coat. Accordingly while a decree-holder who has not filed an execution petition within twelve years of the original decree, and foolishly waits for more than twelve years, for the passing of an amended decree to put it in, cannot file the execution petition and recover a pie after the twelve years period has elapsed; he can very well recover the entire amount due under the amended decree if he has been careful enough to file an execution petition before the twelve years period has elapsed, and if that execution petition is not disposed of before the passing of the amended decree, even though after twelve years, and he has amended the original execution petition by adding it in accordance with the amended decree, with the permission of the Court.

(1940) 1 M.L.J. 235 : I.L.R. 1940 Mad. 349 distinguished.

T. V. Ramanatha Ayyar and *T. S. Venkatarama Ayyar* for Appellant.

T. K. Subramania Pillai for Respondent.

K.S. *Appeal dismissed. Leave granted.*

[F. B.].

Rajamannar, C.J., Viswanatha Sastri and Raghava Rao, JJ.
4th March, 1949.

Sankaranarayana Iyer *v.* Sri Poovananathaswami Temple.
A.A.O. No. 208 of 1947.

Hindu Law—Religious and charitable trusts—Suit on behalf of by de facto *trustee for recovery of property belonging to the idol or mutt held adversely to the trust by a stranger—Maintainability.*

So long as an action for recovery of property belonging to a trust held adversely by a stranger is for the benefit of the real owner, namely the idol or the mutt, and the person bringing the action is the only person who is in management of the affairs of the idol or the mutt for the time being, there is no reason why such person should not be allowed to maintain the action on behalf of the idol or the mutt.

(1938) 2 M.L.J. 663 and (1944) 1 M.L.J. 35 overruled.

I.L.R. 9 Pat. 885 and (1934) 68 M.L.J. 499 : L.R. 62 I.A. 47 : I.L.R. 57 All. 159 (P.C.), relied on and A.I.R. 1940 Mad. 617 approved.

Case-law reviewed and discussed.

Per *Viswanatha Sastri, J.*—It is necessary that Courts should prevent the power of *de facto* trustees to file such suits from being abused or exercised fraudulently or collusively to the detriment of the trust by persons professing to act on behalf of and in the interest of the idol or mutt. When there is a lawful shebait, dharmakarta or head of a mutt, he alone can bring the suits necessary for recovering possession of the property of the institution and otherwise protecting its interests and he alone is the proper person to represent it in a suit filed against the mutt, temple or idol as the case may be.

A. Sundaram Ayyar for Appellant.

V. Ramaswami Ayyar for the first Respondent.

K.S. *Appeal dismissed.*

Rajamannar, C.J. and Balakrishna Ayyar, J.
10th March, 1949.

Parvathi Amma *v.* Chathu Kutty Nair.
App. No. 14 of 1946.

Malabar law—Tarwad—Property standing in the name of a junior member—Presumption is that it belongs to him and not to the tarwad.

When properties stand in the name of an *anandravan* the presumption would be that they belong to him and not to the tarwad.

I.L.R. 1947 Mad. 272 at 295 relied on.

K.S. *Appeal allowed.*

Balakrishna Ayyar, J.
18th March, 1949.

Ramanna *v.* Suramma.,
C.R.P. No. 1580 of 1947.

Provincial Insolvency Act (V of 1920), *sections* 4 *and* 53—*Application for declaration that a sale deed by the insolvent was without consideration and for defeating the claims of the creditors of the insolvent—Barred by decision in prior suit under section* 53 *of the Transfer of property Act in which the Official Receiver though added as party remained* ex parte.

The Official Receiver though added as a party in a representative capacity to a suit against the debtor under section 53 of the Transfer of Property Act for a declaration that a sale deed by the debtor was executed without consideration and for defeating the claims of the creditors remained *ex parte* and the suit was ultimately dismissed. In a subsequent application by the Official Receiver under sections 4

and 53 of the Provincial Insolvency Act for a declaration that the sale deed in question was executed without consideration and for defeating the claims of the creditors, it was contended that questions arising under the Insolvency Act can be decided only by Courts exercising powers under that Act and that the ordinary Civil Courts have no jurisdiction to do so and that therefore the prior decision in the suit under section 53 of the Transfer of Property Act did not operate as *res judicata.*

Held : A decision given under section 53 of the Transfer of Property Act stands on a different footing and may operate as *res judicata.* I.L.R. 50 Mad. 776 referred. In any event the Official Receiver having remained *ex parte* in the prior suit cannot be allowed to re-agitate the question again before the insolvency Court.

A.I.R. 1937 Lah. 4 relied on.

T. Satyanarayana Rao for Petitioner.

K. Bhimasankaram for Respondent.

K.S. ——— *Petition dismissed.*

Somasundaram, J.
23rd March, 1949.

Papayyaswamy, *In re.*
Cr.R.C. No. 348 of 1949.
(Cr.R.P. No. 298 of 1949).

Penal Code (XLV of 1860), *sections* 465 and 471—*Person posting application at Vizagapatam for admission to competitive examination along with three forged documents——Application addressed to Madras Public Services Commission who considered it—Offence where committed—Territorial jurisdiction.*

The petitioner along with his application to the Madras Public Services Commission for admission to a competitive examination enclosed three documents which were forged. They were posted at Vizagapatam and received in the Office of the Public Services Commission at Madras. The applications were considered by the Commission. In a prosecution at Madras for offences under section 465 of the Penal Code it was contended that the Madras Court had no jurisdiction as the offence of using forged documents was complete at Vizagapatam.

Held : The real user of the documents comes in only when the Madras Public Services Commission looks into the application and considers it and as the offence was committed at Madras the Presidency Magistrate's Court has jurisdiction to try the petitioner for the offences charged.

Vepa P. Sarathy and *E. L. Bageeratha Rao* for Petitioner.

The Crown Prosecutor (*Govind Swaminathan*) on behalf of the Crown.

K.S. ——— *Petition dismissed.*

Satyanarayana Rao and Viswanatha Sastri, JJ.
23rd March 1949.

Kesavan *v.* The South Indian Bank Ltd.
O.S.A. No. 40 of 1948.

Madras High Court Original Side Rules—Order 7, *rule* 6—*Unconditional leave to defend—When granted—Tests.*

To entitle a defendant in a summary suit to get unconditional leave to defend, the defence must raise a plausible case for trial and if established must be a sufficient answer to the claim. The only test to be applied is whether the defences raised a real issue and not a sham issue in the sense that if the facts alleged, by the defendant are established there would be a plausible defence on those facts.

85 L.T. 262 ; 77 L.T. 255 (C.A.) ; 46 M.L.J. 255 ; I.L.R. 58 Mad. 116 and I.L.R. 1939 Mad. 36 discussed.

Messrs. Sundararajan and *Sivaswami* for Appellant.

Messrs. John and Row and C.T. Verghese for Respondent.

K.S. — *Appeal dismissed.*

Satyanarayana Rao and Viswanatha Sastri, JJ. Muhammad Ibrahim *v.* Abdul Hafeez Sahib.
24th March, 1949. L.P. App. No. 10 of 1948.

Lunacy Act (*IV of* 1912), *section* 62—*Application under for directing inquisition—Jurisdiction—Legal residence by having permanent residence in family house and property within jurisdiction—Removal of lunatic out of jurisdiction—Effect on jurisdiction to entertain the application for inquisition.*

Where an alleged lunatic has his permanent residence where his paternal home exists and where his family permanently resides, the District Court having jurisdiction at that place has jurisdiction to entertain an application for directing judicial inquisition under section 62 of the Lunacy Act. The removal of the lunatic whether by legal means or otherwise to the Mysore State and the residence of the alleged lunatic there might constitute temporary residence there, but would not put an end to the legal residence which the alleged lunatic had already possessed within the jurisdiction of the District Court. Accordingly the District Court would not cease to have jurisdiction over the matter.

I.L.R. 48 Cal. 577 ; A.I.R. 1929 Cal. 512 and A.I.R. 1931 Cal. 711, followed. (1919) 21 M.L.J. 669 : L.R. 38 I.A. 129 : I.L.R. 34 Mad. 257 (P.C.). referred to.

G. R. Jagadisa Iyer for Appellant.

T. Venkatadri and *V. Krishnaswami* for Respondents.

K.S. — *Appeal allowed.*

Rajamannar, C.J. and Balakrishna Ayyar, J. Commercial Employees Association *v.* The Labour Commissioner.
1st April, 1949. C.M.P. No. 1317 of 1949.

Madras Shops and Establishments Act (*XXXVI of* 1947), *section* 51—*Application by labour association to Labour Commissioner for decision of certain questions—Letter addressed by representative of company to the Labour Commissioner without notice to the applicant association giving a precis of arguments after closing of hearing in which both sides were represented by legal practitioners—Decision of Labour Commissioner—If vitiated by the irregularity.*

An application was made by an Employees Association to the Commissioner for Labour for the decision of certain questions. Both the employer company and the applicant association were represented by legal practitioners at the hearing. After the hearing was over a representative of the company wrote a letter to the Commissioner without notice to the applicant association giving a precis of the arguments which were incorporated in the order.

Held : The Commissioner though entrusted with more or less judicial functions was not acting as a Court. No doubt it was not proper to address the letter to the Commissioner without notice to the opposite party. But as the letter was as it purported to be nothing more than a summary of the arguments on behalf of the company, notes of which had already been taken by the Commissioner of Labour, the order in question cannot be deemed to be invalid because any rule of natural justice had been violated. The validity of the order was not vitiated by the irregularity.

The jurisdiction of the Commisioner of labour under section 51 of the Madras Shops and Establishments Act is confined to the determination of two questions: (1) whether all or any of the provisions of the Act apply to an establishment and (2) whether section 50 applies to any case or not.

It cannot be said that employees will be entitled to overtime wages only when the statutory hours are exceeded.

K. C. Doraiswamy and *V. G. Row* for Messrs. *Row and Reddy* for Petitioners.

The Advocate-General (*K. Rajah Aiyar*) instructed by the Crown Solicitor and *C. Doraiswami* instructed by *Messrs. King and Partridge* for the Respondents.

K.S. ——— *Application granted partially.*

Rajamannar, C.J. and Rajagopalan, J. Kota Ananda Krishna Chetty *v.* M.K. and Company.
4th April, 1949.

C.M.P. No. 946 of 1949.

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *section* 7 (3) (a) (ii)—*Landlord in occupation of residential building in which he carries on his business—If ground for denying right to recover possession of his non-residential building for his use from his tenant.*

The fact that a landlord is in occupation of a residential building in which he is carrying on his business is not sufficient to prevent him from obtaining possession of a non-residential building of his own for carrying on his own business under section 7 (3) (*a*) (*ii*) of Madras Act XV of 1946. The essential condition laid down in that section before he can be denied his right to get back such possession is that he was occupying for the purpose of a business which he is carrying on a *non-residential* building which is his own or to the possession of which he is entitled.

V. Radhakrishnayya and *S. Ramaswami Iyengar* for Petitioner.

S. Ramachandra Ayyar for first respondent.

K.S. ——— *Order quashed.*

Satyanarayana Rao and Viswanatha Sastri, JJ. Ramiah, *In re.*
5th April. 1949. Cr.M.P. Nos. 442 to 447 of 1949.

Madras Maintenance of Public Order Act (I of 1947), *section* 2 (1)—*Delegation of power to Commissioner of Police to order detention—If deprives the Governor of the power to make orders for detentions.*

Merely because the Commissioner of Police is authorised by the Provincial Government by virtue of section 15 of Madras Act I of 1947 to exercise the powers under section 2 (1) the Provincial Government is not deprived of that power.

It cannot be said that it is not open to the detaining authority to take into consideration the activities of the persons (sought to be detained) outside the Province in arriving at the satisfaction contemplated by section 2 (1) of the Act. If such person was at the time of the order within the Province an order for detention can be validly passed by the Government of Madras. Where the basis for satisfaction was the activity of the persons concerned in Malaya as Communists indulging in violence, so long as it was proximate enough in date, will be relevant material under section 2 (1).

V. G. Row for *Messrs. Row and Reddy* for Petitioners.

The Crown Prosecutor (*S. Govind Swaminathan*) on behalf of the Crown.

K.S. ——— *Applications dismissed.*

Horwill and Raghava Rao, JJ. Sultan Badsha *v.* Celin Phillip.
16th March, 1949. O. S. A. No. 17 of 1948.

Madras Agriculturists' Relief Act (IV of 1938), *section* 8—*Principal amount of promissory note consisting of sums originally advanced and interest that has accumulated from time to time—Payments towards principal—If to be appropriated to the principal of the promissory note or the amount originally advanced.*

Where a debtor makes a payment on a promissory note towards principal, it must be set-off against the principal of the promissory note although the principal of that promissory note may consist of sums originally advanced and interest that has accumulated from time to time.

(1941) 1 M.L.J. 216 and (1941) 1 M.L.J. 256, relied on.

All that the explanation (1) of section 8 of Madras Act IV of 1938 (as recently amended) does is to re-enunciate what was laid down in all the earlier cases under the Act that open payments not expressed as being in discharge of principal or interest should be credited against the sums originally advanced thus going behind the decision in (1948) 1 M.L.J. 441.

But when a party makes a payment towards principal and that payment is endorsed on a promissory note it is clear that the parties intended the payment to be towards the principal of the promissory note and not to any hypothetical principal, namely, the amount originally advanced.

S. Azizuddin for Appellant.

G. A. Chellayya Nadar and *Robert Chellayya* for Respondents.

K.S. *Appeal dismissed.*

Satyanarayana Rao, and *Viswanatha Sastri, JJ.* Kuppuswami Asari *v.* Manikasari.
24th March, 1949. L. P. A. No. 25 of 1947.

Hindu Law of Inheritance (Amendment) Act (II of 1929)—*If applicable to succession to stridhanam property of a Hindu lady.*

The rule of succession to the stridhanam property laid down in the Mitakshara school of Hindu Law has not been in any way altered by the Hindu Law of Inheritance (Amendment) Act (II of 1929). That Act is expressly limited to succession to the property of a male and has no application to succession to stridhanam of a Hindu lady.

I.L.R. 1947 Mad. 23, followed; Decision of Lakshmana Rao, J., (25-2-47) in S. A. No. 2069 of 1945 affirmed.

G. Ramakrishna Aiyar and *P. N. Sundaresan* for Appellant.

T. R. Arunachalam for Respondent.

K.S. *Appeal dismissed.*

Subba Rao and *Panchapakesa Ayyar, JJ.* Oosman and Company *v.* Abdul Malick Sahib.
25th March, 1949. Appeals Nos. 37 and 38 of 1946.

Trade Mark—Nature and essence of—Assignment—Essentials for validity—Transfer of trade mark separate from goodwill or the business—If creates a right in the assignee to the use of the mark.

A trade mark is a mode of warranting the origin of the goods to which it is attached, or their trade association and it is of the essence of a trade mark that its

representation should be true. *The British American Tobacco Co., Ltd.* v. *Mahboob Buksh,* I.L.R. 38 Cal. 110. The purchaser of a trade mark becomes owner of it only if he becomes at the same time the purchaser of the manufactory or the business concerned in the goods to which the mark has been affixed. *Lacteosote Ltd.* v. *Alberman,* 44 R.P.C. 211. No trade mark can be assigned except in connection with the goodwill of the business in which it has been used, which business must be co-extensive with the goods or classes of goods in respect of which the trade mark is registered. *Edwards* v. *Dennis,* 30 Ch.D. 454.

The law does not recognise transfer of trade mark *per se,* separate from goodwill or the business and such assignee of the mark only, acquires no legal title in such trade marks and can be restrained by injunction from using the same.

A. Viswanatha Aiyar and *D. C. Krishnamurthi* for Appellant.

K. V. Ramachandra Aiyar for Respondent.

K. S. ——— *Appeal dismissed.*

Subba Rao and *Panchapakesa Ayyar, JJ.*
28th March, 1949.

Perumal Mudaliar *v.* The Province Madras.
Appeal No. 50 of 1946.

Government of India Act (1935), *section* 175 (3)—*Contract by Government—Requirements—Contract entered into by Superintendent, Kerala Soap Institute with the permission of the Director of Industries who alone was authorised to enter into contracts—If valid and enforceable.*

The Superintendent, Kerala Soap Institute, by correspondence accepted the offer of a merchant to supply a quantity of ground-nut oil. The merchant did not supply the oil agreed upon within the time prescribed. The Government purchased the oil from a third party and filed a suit for recovery of damages—the difference in the price.

Held, assuming that no formal document embodying the contract is necessary and that it could be gathered from the correspondence, the correspondence, embodying the contract must *ex facie* show that the contract was entered into by the Government or on behalf of the Government. Where all that is disclosed is that the Superintendent of the Soap factory entered into the contract with the permission of the Director of Industries, the contract is one concluded between the Superintendent and the merchant and it cannot be said that it was entered into with the Director of Industries who alone was authorised to enter into contracts.

As the contract did not comply with the provisions of section 175 (3) of the Government of India Act, 1935, it was invalid and unenforceable and a suit for damages based upon the same is not maintainable.

C. R. Pattabhiraman and *R. Ramasubbu Ayyar* for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

K.S. ——— *Appeal allowed.*

Subba Rao and *Panchapakesa Ayyar, JJ.*
29th March, 1949.

Chinna Muthu Naidu *v.* Venkataswami Naidu.
Appeal No. 22 of 1946.

Trusts Act (*II of* 1882), *section* 5—*Scope—Shares—Expression of wish by testator as to disposal of—If creates a trust.*

Where the directions by the testatrix in regard to the disposal of certain shares were only an expression of a wish on her part and even that was not

expressed to the heir or to which the heir did not give any assent, no valid trust in respect of the shares as to the disposal of which the wish was expressed is created.

S. Ramachandra Aiyar for Appellant.

C. R. Pattabhiraman and *R. Ramasubbu Aiyar* for Respondents.

K.S. ——— *Appeal dismissed.*

Horwill and Raghava Rao, JJ. Sivaprakasa Mudaliar *v.* Samarapuri.
31st March, 1949. A. A. O. No. 52 of 1949 and C.R.P. No. 92 of 1949.

Companies—Private company consisting of only two shareholders appointed managing agents of another company—The two shareholders falling out and making it difficult to carry on their business—Appointment of receiver—Propriety.

Where a private company consisting of two shareholders have been appointed managing agents of another company and the two shareholders fall out and each has his own faction in the company of which they are the managing agents, a receiver can properly be appointed to carry on the business of the private company of managing agents.

C. Narasimhachariar for Appellants.

Messrs. Rao and *Ram* for 1st Respondent.

K.S. ——— *Appeal and Petition dismissed.*

Subba Rao, J. Clement Aaron *v.* Chathu Nayar.
1st April, 1949. C. R. P. No. 1741 of 1947.

Malabar Tenancy Act (*XIV of* 1930), *section* 3, *clause* (v)—*Lessee taking land for the purpose of constructing a smithy—Is a tenant within the meaning of the Act.*

Persons taking possession of land from the landlord on a lease for a term for the purpose of erecting a smithy agreeing to pay a rent are " tenants " within the meaning of clause (*v*) of section 3 of the Malabar Tenancy Act. The definition of " tenant " in the Act is very comprehensive.

A. Achuthan Nambiar for Petitioner.

D. A. Krishna Wariar for Respondent.

K.S. ——— *Petition dismissed.*

Panchapakesa Ayyar, J. Maria Pillai *v.* Muthukumaran.
1st April, 1949. A. A. A. O. No. 136 of 1947.

Hindu Law—Liability of father endorsing a promissory note after receiving valuable consideration to make good the amount when the promissory note is found to be unsupported by consideration—Not an avyavaharika debt—Death of father—Decree against assets of father in the hands of his sons—Executability.—Pious obligation of sons—Property that can be proceeded against—Limits.

The liability of a father endorsing a promissory note after receiving valuable consideration, to make good the amount when the promissory note is found to be unsupported by consideration cannot be said to be an *avyavaharika* debt in the nature of a surety debt.

(1945) 2 M.L.J. 160 (P.C.), distinguished.

Where a decree for such liability has been granted on the death of the father (during the pendency of the suit) against the assets of the father in the hands of his sons and grandsons it can be executed against the joint family property in their hands and not only against the father's separate property.

(1946) 2 M.L.J. 361, relied on.

Ancestral properties in the hands of the undivided sons and grandsons can be proceeded against freely to enforce their pious obligation under a decree.

(1947) 2 M.L.J. 183, relied on.

It is obvious that a father who died undivided cannot have any specific share in the ancestral properties to be proceeded against and the entire ancestral properties can be proceeded against under the theory of pious obligation for a decree obtained against the father.

V. C. Veeraraghavan for Appellant.

M. S. Venkatarama Aiyar for Respondent.

K.S. ——— *Appeal dismissed. Leave refused.*

Mack, J.
4th April, 1949.

Lakshminarasimhayya *v.* Sri Mahant Prayag Dossjee Varu.
C. R. P. No. 1159 of 1946.

Civil Procedure Code (V of 1908), *section* 60—*Act XXV of* 1942, *Act V of* 1943 *and Act IX of* 1937—*Scope and effect—Salaries of private persons—Exempt from attachment in suits filed prior to* 1*st June,* 1937 *also.*

It is open to a decree-holder in a suit prior to 1937 to continue to execute his decree on exactly the same conditions as decree-holders in suits instituted subsequent to 1st June, 1937.

It was consciousness of the inequity of section 3 of Act IX of 1937, discriminating as it did between classes of judgment-debtors which led to this Act IX of 1937, in particular, section 3 being repealed by Act XXV of 1942.

A.I.R. 1946 Bom. 102, dissented from.

C. A. Vaidyalingam and *T. Rangaswami Ayyangar* for Petitioner.

V. M. Ramaswami Mudaliar and *N. Gopala Menon* for Respondent.

K.S. ——— *Petition allowed.*

Satyanarayana Rao and *Viswanatha Sastri, JJ.*
5th April, 1949.

Sundara Rama Rao *v.* Satyanarayanamurthi.
L. P. A. No. 95 of 1946.

Hindu Law—Joint family—Adoption by widow—Consent of coparceners improperly refused—Adoption with consent of divided sapinda—Validity.

A widow of a coparcener can make a valid adoption with the consent of a divided sapinda when the undivided coparcener has improperly refused to give his assent to the adoption. Statement to the contrary in *Mayne's Hindu Law,* 10*th Edition,* Page 219, dissented from, 39 M.L.J. 70; L.R. 47 I.A. 99; I.L.R. 43 Mad. 650 (P.C.), relied on.

Authorities exhaustively discussed.

Decision of Rajamannar, J., affirmed. (S. A. No. 586 of 1945, dated 9th August, 1946).

N. Bapi Raju for Appellant.

P. Somasundaram for Respondent.

K.S. ——— *Appeal dismissed.*

Somasundaram, J.
8th April, 1949.

Ganesan, In re.
Cr. R. C. No. 303 of 1948.
(Cr. R. P. No. 274 of 1948).

Motor Vehicles Act (IV of 1939), *section* 116—*Gist of offence under—Motor driver through error of judgment taking risk in driving in a narrow place and knocking down a person —If criminally liable.*

In cases of accident one must keep out of one's mind the prejudice that inevitably crops in by reason of the fact that lives have been lost and the responsibility for the same ultimately rests with none else but the accused. This prejudice is bound more or less to reflect on the question of the culpability of the accused and give rise to false issues which tend to cloud judicial vision.

I.L.R. 53 Cal. 333, relied on.

Only dangerous driving is made punishable under section 116 of the Motor Vehicles Act. Even reckless driving is excluded from the purview of section 116. Acts which fall under the category of what is called 'guilty error of judgment' are not punishable. Where a motor bus driver thought that he could get the bus through the interspace available without hitting against any alien body, but in spite of it an accident took place, he is not to blame. The driver is only guilty of error of judgment and not guilty of dangerous driving under section 116 of the Motor Vehicles Act.

Basi Reddi, A. C. Muthanna and *R. Ramachandra Reddi* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown Prosecutor on behalf of the Crown.

K.S. ——— *Conviction and sentence set aside.*

Satyanarayana Rao and *Viswanatha Sastri, JJ.*
11th April, 1949.

Dalayya Patrudu, In re.
Cr. M. P. No. 355 of 1949.

Madras Maintenance of Public Order Act (I of 1947), *section* 3 (1)—*Imperative duty of Government to serve all the grounds on which the detention was based.*

It is not open to the Government to cut out or exclude any of the grounds on which an order of detention was made by the District Magistrate or the detaining authority. It is the imperative duty of the Government under section 3 (1) of the Act to serve all the grounds on which the detention was based.

N. S. Mani for *Row and Reddi* for Petitioners.

N. T. Raghunathan for the Public Prosecutor on behalf of the Crown.

K.S. ——— *Application dismissed.*

Rajamannar, C.J. and
Balakrishna Aiyar, J.
12th April, 1949.

Malaiperumal Pillai *v.* Deputy Registrar, Co-operative Societies, Madras.
C. M. P. Nos. 573 of 1949 and 6622 of 1948.

Madras Co-operative Societies Act (VI of 1932), *section* 51—*Deputy Registrar on whom the powers of a Registrar under section* 51 (1) *and* (2) *have been conferred himself acting as arbitrator and giving award on a reference—Validity of award.*

Where the Deputy Registrar on whom the powers under section 51 (1) and (2) of the Madras Co-operative Societies Act have been conferred considers himself to be a Registrar and an arbitrator within the meaning of section 51 (2) and makes an award, it cannot be deemed to be an award in law.

If the Deputy Registrar had decided to decide the dispute under section 51 (2) (*b*) he could only decide it as a person to whom it had been transferred for disposal by the Registrar. He could not in that event dispose of the case as an arbitrator. When there is nothing to show that either the Registrar or Deputy Registrar decided under section 51 (2) (*a*) of the Act to refer the dispute for disposal by arbitration an award purporting to be by the Deputy Registrar and arbitrator cannot be deemed to be an award in law. The Deputy Registrar in purporting to act as arbitrator clearly acted without jurisdiction and his award must be quashed.

T. G. Aravamudhan for Petitioner.

P. Veeraswami instructed by the Crown Solicitor for the first respondent.

T. Venkatadri for the second respondent.

K.S. ——— *Award quashed.*

Subba Rao and *Panchapakesa Ayyar, JJ.* 14*th April,* 1949.

Palaniappa Pillai, In re. Cr. Appeal No. 38 of 1949.

Evidence Act (*I of* 1872), *section* 32—*Dying declaration not separately recorded as such but in the police case diary—Admissibility—Requirements.*

A dying declaration need not be recorded on a separate piece of paper but may be recorded even in the case diary. Nor need it be intended to be taken as a dying declaration. It is enough if the man dies later on and the statement or declaration relates to the circumstances of his death. Nor need he make the declaration in expectation of his death. Nor does it require corroboration.

(1940) 1 M.L.J. 124 (F.B.), relied on.

Where such statement was not dictated by the deceased and read over to him and signed by him after admitting it to be correctly recorded, the statement would not be primary evidence. But the verbal statement of the deceased in answer to questions put to him by the investigating officer who was allowed by both sides tacitly to read the record made by him must be deemed to have been proved by such evidence.

When the statement was recorded within one hour after the offence and no further dying declaration was recorded from the man as no body evidently expected him to die or at least to die so soon it cannot be said that little weight could be attached to the statement when he actually died more than a month from the date of making the statement.

59 M.L.J. 876, distinguished.

N. S. Mani for Appellant.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

K.S. *Conviction and sentence modified.*

[END OF VOLUME, 1949—I.]

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